

Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor

MANUEL R. RAMOS*

"Open confession is good for the soul." American saying.

"Confession is the source of justice." Russian saying.

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* Associate Professor of Law, Tulane Law School; B.A., *magna cum laude*, Yale University, 1974; J.D., University of Virginia, 1978. A former partner with Lewis, D'Amato, Brisbois & Bisgaard, one of California's largest law firms, and co-founder of its San Diego office, Professor Ramos has handled over 900 legal malpractice cases for over 20 insurers. Many thanks go to Tulane Law School for providing generous financial and administrative support for scholarship, including my excellent research assistants Heather Ancrum, Carmen Irizarry, and Andrew Li and a wonderful secretary, Rita LoPiccolo.

I. INTRODUCTION: THE SECRET \$4 BILLION A YEAR ECONOMY

During the 1980s, I was a partner in a California law firm that grew from seven to over two hundred lawyers. It was the fastest-growing law firm in the country,¹ but more significant was the fact that our clients were lawyers who were sued for legal malpractice and insured by over twenty different insurers. Hundreds of us represented tens of thousands of lawyers. Every year millions of dollars were given to plaintiffs, their counsel, and our firm. However, nobody knew. All the cases settled with confidentiality agreements.²

My clients in over nine hundred cases included solo practitioners, lawyers in small and medium-sized firms, and partners in the nation's largest law firms. The cases were worth from \$10,000 to \$100,000,000. In the twenty years since going to law school, I have developed a unique insight into both the legal

¹ See Nancy Rivera, *Southland Business: Fastest Growing Law Firms*, L.A. TIMES, Oct. 6, 1985, at V-4 ("Five Los Angeles-based law firms were among the nation's fastest growing . . . Lewis, D'Amato, Brisbois & Bisgaard was listed as the fastest-growing firm [nationwide] among those employing fewer than 100 lawyers. Lewis, D'Amato recorded a 71.4% jump to 84 lawyers."); see also *Annual Survey of the Nation's Largest Law Firms*, NAT'L L.J., Oct. 9, 1995, at C6, C18 (showing Lewis, D'Amato dropping from 134 to 173 in the largest law firm rankings). In 1994, the firm lost 31 lawyers, rapidly decreasing from 209 to 178 lawyers. In the 1990s, Lewis, D'Amato lost much of its legal malpractice business. After heavy losses, Crum & Foster Commercial Insurance ceased writing legal malpractice insurance in California. The Home Insurance Companies, the nation's largest legal malpractice carrier based on the number of insureds, lost a significant market share to San Diego's Golden Eagle Insurance Company whose premiums were significantly less. Despite efforts to diversify, the loss of legal malpractice business will continue to have an adverse impact on Lewis, D'Amato.

² Lawyers at Lewis, D'Amato used the same boilerplate settlement agreement for all insurers' cases, and it included a confidentiality provision. See Lloyd Doggett & Michael J. Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 TEX. L. REV. 643, 659 nn.71-72 (1991) (noting that while Texas is the most "open" state regarding confidentiality, it still allows for confidential settlement agreements that keep the amount secret); Richard B. Schmitt, *Critics Say Courts Seal Too Much Data*, WALL ST. J., Oct. 4, 1995, at B1 ("Still, sealing court documents has become standard in many business disputes, and that troubles free-speech advocates and even some corporate adversaries, who say the agreements are being used in some cases simply to avoid bad publicity."); see also Barbara A. Servano, *Foreman's Name Removed from Suit: GOP Candidate Given Anonymity*, SEATTLE TIMES, Aug. 17, 1996, at A1. The Article describes "[f]ellow Republicans had the name of Dale Foreman, now a gubernatorial candidate, removed from a potentially embarrassing legal malpractice lawsuit 10 years ago, a move that some attorneys and judges say is highly unusual." *Id.* The article, probably due to a confidential settlement, was unable to say what "John Doe" (Foreman) paid to settle the case.

profession and legal education. It is not a pretty picture, but my story should be told.

Plaintiff's legal malpractice lawyers are also muzzled by confidential settlement agreements. Tom Bousquet, head of a Houston law firm that sues lawyers,³ told my legal malpractice seminar at Tulane Law School that he gets two to three calls a day from potential clients who want to sue their lawyers—over five hundred calls a year, but he only takes four or five cases. Most of the calls are against solo practitioners and, incredibly, ninety percent of them do not have insurance.⁴ Even in the big cases against insured lawyers, the few that get to trial never accurately see the light of day. For example, Bousquet recently won a \$6.65 million legal malpractice jury trial. The case quickly and secretly settled for probably seven figures. Nonetheless, all one could read was a news story reporting that the trial judge set aside the jury verdict due to “insufficient evidence.”⁵ “That’s one disadvantage in what I do,” said Bousquet, “you can’t toot your own horn.”⁶

³ See *Who's Who Among the Leading Lawyers in Malpractice Bar*, NAT'L L.J., June 13, 1994, at A24 [hereinafter *Who's Who*].

Thomas G. Bousquet of Houston's Bousquet, Parsons & Malm started as an insurance defense attorney, but about 16 years ago he switched sides. With nearly two-thirds of his workload consisting of plaintiffs' legal malpractice cases, he is one of the better-known such attorneys in Texas. He tried his first lawyer malpractice case in 1962, when, he says, he sued Houston's Vinson & Elkins L.L.P. Since then, he has handled upwards of 200 such matters. He says his largest recovery was for \$9.5 million. Mr. Bousquet founded the Texas Academy of Legal Malpractice Attorneys, a plaintiffs' group with a handful of members that is pushing for mandatory insurance for lawyers.

Id.

⁴ See Thomas Bousquet, Tulane Law School Legal Malpractice Seminar Notes (Oct. 12, 1995) (on file with author); see also Joseph E. Calve, *The Naked Truth About Going Bare: More Lawyers Than Ever Are Practicing Without Malpractice Coverage, Not Because They Have To, But Because They Want To*, TEX. LAWYER, Nov. 27, 1995, at 1, 15 (“The best estimates [for Texas] peg non-coverage at about 50 percent . . . [For] solos and small-firm lawyers, the estimates jump to 60 percent to 90 percent.”).

⁵ See Brenda Sapino, *Bonham, Carrington Dodges \$6.65M Verdict; Take-Nothing Judgment Signed After Judge Grants New Trial*, TEX. LAWYER, Apr. 22, 1991, at 12.

Every year insurance carriers pay \$4 billion for legal malpractice and the same amount for medical malpractice.⁷ Lawyers commit every bit as much malpractice as doctors.⁸ Up to twenty percent of lawyers each year face legal malpractice exposure, but only a fraction, those with malpractice insurance, are sued.⁹

Facing \$6.65 million of a \$9.5 million jury malpractice verdict, Houston's Bonham, Carrington & Fox escaped with an agreed take-nothing final judgment signed April 18. The firm cited insufficient evidence in a motion for new trial granted the same day by 333rd District Judge Richard P. Bianchi, who then signed the judgment freeing the firm from the verdict reached March 18 in a case brought by a Houston developer. Each side will pay its own costs, according to the judgment.

Id.

⁶ Bousquet, *supra* note 4. Specifically recalling what undoubtedly was a multi-million dollar settlement in the \$6.65 million legal malpractice verdict against Bonham, Carrington & Fox, Bousquet said:

The lady reporter who called me was all confused. I told her, "All I can say is that I am satisfied with the result." "But how can you be satisfied! The judge just dismissed your case!" She was all confused. I said, look lady, that's all I can say. Go talk to other trial attorneys in town. Let them explain it to you.

Id.

⁷ See OTIS R. BOWEN, ET AL., DEPT. OF HEALTH AND HUMAN SERVICES, REPORT OF THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE 13 (1987) (noting that by 1985, medical malpractice costs were estimated at \$3.8 billion annually); see also WILLIAM A. LOVETT, BANKING AND FINANCIAL INSTITUTIONS LAW 349-50 (showing the premiums written for medical malpractice insurance as: 1981 (\$1.3 billion), 1986 (\$3.5 billion), and 1990 (\$4.0 billion)).

⁸ See, e.g., PAUL C. WEILER, ET AL., A MEASURE OF MALPRACTICE 139 (1993) (detailing a six-year Harvard study of thirty thousand hospital files in New York finding that "one malpractice claim was filed by a New York patient for every 7.5 patients who suffered a negligent injury"); see also Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693, 709 (1994) (book review) ("[F]our times as many [medically] negligent injuries occurred as were recorded [in the hospital files].").

⁹ See Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1664-71 (1994) (noting that legal malpractice incidents often go unreported for various reasons). However, Oregon, the only state with mandatory legal malpractice insurance, has annual frequency of claims and lawsuits of 13.2% even though it is one of the least litigious states in the nation. *Id.*

Legal malpractice has become the predominant way in which the legal profession regulates itself.¹⁰ Only 2.4% of \$4 billion, or \$95,491,060 is spent

¹⁰ See John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 102-03 (1995). Rutgers' Professor Leubsdorf, an author of the civil liability sections of the ALI's pending RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (1994), notes:

The time has come to consider legal malpractice law as part of the system of lawyer regulation. . . . The civil liability of lawyers obviously has a role to play in promoting the goals of this regulatory system. These goals include insuring that lawyers fulfill their fiduciary duties to clients, restraining overly adversarial behavior which is harmful to non-clients, and promoting access to legal services. Yet legal malpractice law has rarely been considered in the light of such goals.

Leubsdorf, *supra*, at 102-03. In a round-table discussion with Stephanie Goldberg, an assistant editor of the *A.B.A. Journal*, Stanford law professor Deborah L. Rhode, UCLA law professor Richard L. Abel, *Newsweek's* legal contributing editor Lincoln Caplan, and former White House counsel Lloyd Cutler, Rhode and Abel comment on the growing legal malpractice trend as follows:

ABA Journal: This question is for Richard Abel. Do you see a race to the bottom?

Abel: I would put it differently. Up through the 1960s and '70s, elite lawyers elevated their own moral stature by calling attention to the moral derelictions of the solo and small-firm practitioner, the ambulance chaser, the lawyer who copped a plea for a client without bothering to go to trial, the incompetence and the general sleaziness of much solo and small-firm practice.

That hasn't changed. What has changed is that the elite now share some of the taint, so that there is a real danger in launching any kind of moral crusade because your own peers, and maybe even your own firm, will be tarred by it.

Again, I've been very skeptical that there has been any significant change in the ethical quality of practice over the last 20 years.

One thing that has happened is that elite lawyers, who were almost entirely immune from any kind of ethical scrutiny until 10, 15 years ago, now are subject to a great deal more external attention through malpractice and legal liability. The savings and loan crisis tarred the profession more deeply perhaps than almost anything that has happened before. And that seems to me to be part of the crisis.

Rhode: I think the legal profession often perceives rising malpractice rates to be a problem, but it's partly a problem of the profession's own making. The bar's refusal to set codified standards at levels that match public expectations or to create disciplinary structures that are sufficiently staffed, funded and responsive to consumer concerns has pushed more regulatory issues into the courts.

annually on lawyer discipline nationwide.¹¹ Lawyers in private practice only have a 0.003% chance each year of losing their licenses due to discipline enforcement.¹² The legal profession's traditional, self-regulatory disciplinary model based on vague ethical standards¹³ taught in law schools, does not even make for good public relations anymore.¹⁴ It does not and cannot work.¹⁵ It is

The lax standards and enforcement structure that the profession has set for itself are being increasingly displaced by civil liability claims and by administrative agency oversight.

Stephanie B. Goldberg, *Identity Crisis: ABA Journal Round Table*, 80 A.B.A. J. 74, 76 (Dec. 1994). *But see* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801, 831 n.129 (1992). Wilkins, a Harvard law professor acknowledges that legal malpractice lawsuits are a form of lawyer regulation, but after citing flawed ABA legal malpractice statistics, concludes that it is too ineffective. *Id.*

¹¹ See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS 1991-92, Chart V (1995) (noting that 46 jurisdictions' 1992 budgets were reported and California's \$37.2 million accounted for close to 40% of the total).

¹² See *id.* at Chart I (noting that in 1991, there were 1,776 lawyers who either had been disbarred, suspended or resigned due to disciplinary charges); see also BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S, at 25 (1994) (noting that in 1991 there were 587,289 lawyers in private practice). *But see* Ann Davis, *The Myth of Disbarment*, NAT'L L.J., Aug. 5, 1996, at 1, 24 ("In most states of this country, lifelong disbarment is a myth. . . . Disbarred attorneys who petitioned gained readmission 53.3[%] of the time.").

¹³ See Joseph J. Portuondo, *Abusive Tax Shelters, Legal Malpractice, and Revised Formal Ethics Opinion 346: Does Revised 346 Enable Third Party Investors to Recover from Tax Attorneys Who Violated Its Standards?*, 61 NOTRE DAME L. REV. 220, 225 (1986) ("[T]he lawyer obtains as much precise direction from his guide to professional responsibility as a heart surgeon could usefully derive from examination of a valentine.").

¹⁴ See KAY OSTBERG, HELP AGAINST LEGAL TYRANNY, IF YOU WANT TO SUE A LAWYER, A DIRECTORY OF LEGAL MALPRACTICE ATTORNEYS 11-12 (1995). Help Against Legal Tyranny (HALT) has 150,000 members and is dedicated to changing the legal system to better serve people with legal problems. The authors note that although more than 90,000 complaints have been received by disciplinary agencies, only about 2% of them result in anything more than a private reprimand. *Id.* See also K. Connie Kang et al., *The Brotherhood: Justice for Lawyers*, S.F. EXAMINER, Mar. 24-29, 1985. This six-part investigative report led to the dismantling of California's then-existing disciplinary bar system, replacing it with a more expensive State Bar Court. The articles noted that although there were 9,000 complaints in 1984, 60% were closed without any formal investigation, 94% were dropped prior to a formal hearing, and only 11 attorneys were disbarred. *Id.* For every lawyer suspended due to ethical misconduct, five others were suspended for failing to pay their dues. *Id.* "That system is supposed to protect the public by weeding out unscrupulous lawyers. Instead, it protects lawyers." *Id.*; Symposium, *Weighing Public,*

not taken seriously by lawyers,¹⁶ law students,¹⁷ or the public.¹⁸ It should be scrapped.¹⁹

Private Needs in Discipline Process, N.J. L.J., Jan. 27, 1992, at 15, 28 (quoting John V. R. Bull, assistant to the executive editor of the Philadelphia Inquirer).

I was particularly disturbed as a member of the public—I am not a lawyer—to find that 85% of cases you get are dismissed. I recognize that many of them are matrimonial cases and many of them are probably justifiably dismissed. But it raises one hell of a big question in my mind . . . I find that not credible as a member of the public.

Id.

¹⁵ See ABA'S SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1 (1970) [hereinafter CLARK REPORT]. Called after its chair, retired Supreme Court Justice Tom Clark, the ABA's *Clark Report* concluded that the nation's lawyer discipline system was powerless, antiquated and scandalous. See also LAWYER REGULATION FOR A NEW CENTURY, ABA REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT (1992) [hereinafter MCKAY REPORT]. Named in memory of the late Robert McKay, the New York University law professor who served as commission chair for most of its term, the *McKay Report* concluded that problems still persist some twenty years after the Clark Report. See also RICHARD ABEL, *AMERICAN LAWYERS* 142-57 (1989) (noting that the legal profession is simply incapable of regulating itself); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 595, 602 n.619 (1995). Between 1985 and 1992, the State Bar of California increased its spending for discipline from \$7.8 million, or 44% of its total annual budget, to \$37.2 million, or 74.3% of its annual budget, but despite increased complaints the actual number of lawyers disbarred fell from a high of 89 in 1989 to 47 in 1992. *Id.* Gallagher further notes that "[s]elf regulation will remain a very costly, precarious, and controversial prerogative for California lawyers. Its legitimacy questionable, its efficacy debatable" *Id.* at 627-28.

¹⁶ See generally ABEL, *supra* note 15; OSTBERG, *supra* note 14; Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Deborah L. Rhode, *The Rhetoric of Legal Reform*, 45 MD. L. REV. 274 (1986); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Thom Weidlich, *Suing Lawyers Brings Growth to Shadow Bar*, NAT'L L.J., June 13, 1994, at A1 ("Says [leading plaintiff's legal malpractice lawyer] Larry J. Doherty of Houston's Doherty, Norman & Wagner: 'It's not likely the bar [association] is going to do anything substantively to protect the public. It's a toothless dog. It's as impotent as a neutered bull.'").

¹⁷ See Holly Metz, *Blind Justice—Lawyer Discipline: Who's Watching the Bar?*, STUDENT LAWYER, May 1993, at 26. The article opens as follows:

"Do you trust a fox to guard your henhouse? Do you trust the legal profession to regulate the legal profession? I don't." It's the kind of statement you might expect from

The \$4 billion legal malpractice tab is only a fraction of what must be paid annually through the nation's tort system. However, the \$4 billion merits as much attention as what is being given to the twin engines of the current tort reform drive: medical malpractice and punitive damage jury awards. In 1992, civil juries only awarded a total of \$5.8 billion and only ten percent, or \$580 million, constituted punitive damages.²⁰ Plaintiffs rarely win punitive damages, and when they do, the median is only fifty thousand dollars.²¹ Only 2% of the civil cases were medical malpractice cases where doctors at trial won 70% of the time, and the mean jury award was only \$201,000.²²

a member of Citizens for Justice, or HALT, or any number of consumer organizations advocating legal reform. Yet the speaker here, Julianne D'Angelo, is a lawyer—albeit one who teaches and practices public interest law.

Id.

¹⁸ See Stephanie J. Johnston, *Lawyer Discipline Still Not Ideal, Say Consumer Advocates*, BAR LEADER, Mar.-Apr. 1995, at 32-33.

To consumer advocates, it's all very simple: the disciplinary process should focus on the needs of *consumers*, not those of lawyers. They consider many of the steps disciplinary agencies have taken toward this ideal to be negligible, saying lawyer discipline is still too secretive, too slow, too good to lawyers and generally unfathomable to the average consumer.

"Even when changes are being proposed, we're really just talking about some minimal changes, not a revamping of the system," says Theresa Meehan Rudy [director of education and research for HALT]

"I think there's still a wide gulf between what we ought to do and what we are doing," says David Vladeck [director of litigation group of Public Citizen] "It seems there's not very much of the process focused on the consumer," says Paul Kamenar, executive legal director of the conservative Washington Legal Foundation.

Id.

¹⁹ See Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2591-2600 (1995).

²⁰ See John A. Goerd, et al., *Litigation Dimensions: Torts and Contracts in Large Urban Courts*, 19 STATE COURT J. 5, 8 (1995). The joint United States Department of Justice and National Center for State Courts study, the most comprehensive ever of civil cases, found that in the largest 75 counties only \$2.7 billion in damages were awarded by juries. The authors use a 2.16 multiplier to extrapolate nationwide.

²¹ See Richard C. Reuben, *Plaintiffs Rarely Win Punitives, Study Says*, 81 A.B.A. J. 26 (Oct. 1995) (quoting from the Department of Justice and National Center for State Courts study).

²² See Goerd, *supra* note 20, at 24-26.

Why is legal malpractice not perceived as a significant problem? The American Bar Association's (ABA) spin is that "there is no reliable data documenting that [legal malpractice] is a widespread phenomenon."²³ However, due to confidential settlement agreements, judges, lawyers, and the general public do not have an accurate picture. Few lawyers specialize in suing lawyers, particularly in smaller cities, because they do not want to be ostracized by their peers.²⁴ Moreover, it does not make sense²⁵ to sue the forty

²³ See Harry H. Schneider, Jr., *At Issue: Mandatory Malpractice Insurance, No: An Invitation to Frivolous Suits*, 79 A.B.A. J. 45 (Nov. 1993). Harry H. Schneider was the then chair of the ABA's Standing Committee on Lawyers Professional Liability. See also Leubsdorf, *supra* note 10, at 104 ("The neglect of legal malpractice law contrasts strangely with the attention devoted to its big sister, medical malpractice law. The latter has received much attention from empirical investigators, analysts and legislators.").

²⁴ See Perez-Peña, *When Lawyers Go After Their Peers: The Boom in Malpractice Cases*, N.Y. TIMES, Aug. 5, 1994, at A23 (identifying several leading plaintiff's malpractice attorneys as "outcasts" or "pariahs"). "I'm never invited to any golf outings, I can tell you . . . [t]his practice is hell. The lawyers we sue all take it very personally; they're angry and nasty. Other lawyers think we're scum; even judges look on us unfavorably." *Id.* (Hilton L. Stein of Montville, N.J.); "I think I have their healthy respect. . . . But no, they don't like me." *Id.* (Edward Freidburg, Sacramento, Cal.); "I've had people from all over the country call and say they can't find lawyers to take their cases against other lawyers. . . . Their insurance company may have just written you a check for a million dollars, but the lawyer still acts like it's all your fault, like you just had sex with their teenage daughter. I've only had one attorney admit that he was negligent, ever." *Id.* (Thomas Bousquet Houston, Tex.); See also *Sue My Attorney*, BOSTON GLOBE, Aug. 9, 1995, at 18.

In a world full of lawsuits, counter-suits and lawyers in suits, a person can easily hire an attorney to go after just about anybody. But what happens if a person gets bitten by his or her own legal pit bull? How easy is it to find a second lawyer willing to sue the pinstripes off of the first? Not very if a consumer doesn't know where to look, particularly in a small town. Lawyers who see one another on the golf course consider aggression against colleagues unseemly, not to mention bad for business. . . . [However, the Massachusetts Bar Association in Boston] runs a public referral service listing 174 attorneys statewide who are willing to take on legal malpractice cases

Id.; see also Alison Bass, *Leading Mass. Law Firms Share Common Malpractice Insurer*, BOSTON GLOBE, Aug. 6, 1995, at A14. When Marcia and Steve Smith wanted to sue a leading Boston firm for legal malpractice they were surprised that no other leading Boston law firm would take the case. *Id.* "The other leading firms told us they could not represent us because they all had the same insurance carrier." *Id.* According to a recent *Globe* survey of Massachusetts' largest law firms, that is indeed the case. Of the 20 law firms with more than 60 attorneys, all located in Boston, 16 have the same insurance carrier—Attorneys

to ninety percent of lawyers who are uninsured.²⁶ It is not worth spending time and money to win a case only to see the judgment discharged in bankruptcy.²⁷

Liability Assurance Society Ltd. of Chicago, or ALAS. *Id.* Of the 32 law firms in the state with more than 40 attorneys, 19, or 59%, are covered by ALAS. While there are no written rules forbidding member firms from suing each other, William Freivogel, a vice president at ALAS, says such suits "violate the spirit of the organization." *Id.* The article notes, "Several specialists on legal issues said the involvement of so many large law firms in this kind of arrangement is unethical and may raise antitrust concerns." *Id.*; see also Vicki Vaughan, *Defending Their Profession: More Lawyers Have Entered the Area of Legal Malpractice*, THE ORLANDO SENTINEL, Mar. 26, 1995, at H1 ("It also can be tough to find a hometown lawyer willing to file a malpractice suit against a member of a powerful law firm or a well-known lawyer, some lawyers say.")

²⁵ See Calve, *supra* note 4, at 14. "My theory is that a lawyer that has a lawsuit against an uninsured lawyer is a pocket of poverty." *Id.* (quoting Thomas Bousquet); Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 LITIGATION 13 (1989) ("If there is no coverage and the attorney appears to have few assets, I often reject the suit: it is as uncollectible as the usual uninsured driver case.")

²⁶ See OSTBERG, *supra* note 14, at 41 (noting that "some experts estimate that, nationwide, more than forty percent of lawyers do not carry malpractice insurance"); Thomas G. Bousquet, *It's Time for Mandatory Malpractice Insurance*, TEX. LAWYER, Dec. 6, 1993, at 17 ("Approximately 60[%] of the attorneys in private practice in the state have no professional liability insurance."); Calve, *supra* note 4, at 15 (noting "best estimates peg non-coverage at 50 percent"); Debra Cassens Moss, *Going Bare: Practicing Without Malpractice Insurance*, 73 A.B.A. J. 82 (Dec. 1987) (finding that up to 50% of lawyers in some states uninsured); Bousquet, *supra* note 4 ("Up to ninety percent of sole practitioners in Texas end up having no insurance so those are not pursued."). According to California's Department of Insurance Rate Specialist Bureau's Data, the numbers of California's insured lawyers in private practice were as follows:

TABLE 1. CALIFORNIA'S INSURED LAWYERS IN PRIVATE PRACTICE

Year	Insured Cal. Lawyers
1989	22,536
1990	36,307
1991	36,465
1992	23,141
1993	31,191

DEPT. OF INSURANCE, STATE OF CALIFORNIA, *California Legal Professional Liability Insurance Data, 1989-1993* (1994) [hereinafter CAL. STATE INS. DATA]; see also CURRAN & CARSON, *supra* note 12, at 47 (1994) (noting that in 1991 there were only 81,532 lawyers in private practice in California, so the number of lawyers with clients going "bare" was approximately 55%).

Mandatory car insurance exists because it is good public policy. However, except for Oregon, there is no mandatory legal malpractice insurance.²⁸ Lawyers, of all professionals, owe the highest fiduciary duty to clients, yet oppose any effective system to protect clients harmed by fellow lawyers.²⁹ Going "bare" should not be the primary way to deter legal malpractice claims and lawsuits.³⁰

²⁷ See *Conte v. Gautam*, 33 F.3d 303, 309 (3d Cir. 1994) (finding that even \$1 million in punitive damages awarded by a jury in a legal malpractice case against an attorney found to have acted recklessly and with knowledge of the high probability of harm to his clients was dischargeable in bankruptcy.). Plaintiff's lawyers quickly recognize that, particularly when suing other lawyers, there is "easy money" (insurance policies) and "hard money" (going after and trying to collect on a lawyer's personal assets). Similarly, it is rare for insured lawyers to pay more than the insurance policy limits regardless of plaintiff's damages. See Letter from Barbara S. Fishleder, Esq., Director of Loss Prevention, Oregon's Professional Liability Fund [PLF] to Manuel Ramos (Jan. 20, 1994) (on file with author) (noting that "between two and four cases over fifteen years . . . required attorneys to contribute to the settlement from their own pockets").

²⁸ See Laurel Defoe, *Bill Would Force Malpractice Insurance on Lawyers*, BUS. J. SACRAMENTO, Aug. 4, 1986, at 8. Lester Rawls, former Chief Executive Officer of Oregon's PLF, noted that prior to Oregon's mandatory insurance program, "[a]bout 35[%] of our attorneys were not covered by any insurance at all It wasn't because they couldn't afford it, they just didn't want to pay for it. 'The public be damned,' they'd say. Our bar association didn't think that was an appropriate position." See also Donald R. Fischbach, *Mandatory Malpractice Insurance*, CAL. BAR J. 22 (July 1995). Recommendation 23 of the final report by the Commission on the Future of the Legal Profession and the State Bar of California provides, "Professional liability insurance should be mandatory for all active members of the State Bar. If the minimum level of insurance is not maintained, some members would be suspended from practice." *Id.*; John J. Lynch, *The Insurance Panic for Lawyers*, 72 A.B.A. J. 42, 46 (July 1986) (noting that mandatory legal malpractice insurance has been proposed unsuccessfully in Arizona, California, Colorado, Delaware, Washington and Wisconsin).

²⁹ See Schneider, *supra* note 23, at 45 ("[P]remiums surely will rise . . . and there will be an increase in the frequency of malpractice claims, frivolous and otherwise."). But see Bousquet, *supra* note 26, at 15 (arguing for mandatory insurance); Ramos, *supra* note 19, at 2614-15 (showing how the \$4 billion legal malpractice costs will actually go down if all lawyers in private practice are insured and insurers follow the efficient claims handling of the Oregon PLF mandatory insurance model); David Z. Webster, *At Issue: Mandatory Malpractice Insurance, Yes: It's Essential to Public Trust*, 79 A.B.A. J., (Nov. 1993) (noting that other Western countries such as Canada, Australia, the U.K., and Ireland require their barristers and solicitors to carry legal malpractice insurance and that mandatory malpractice insurance has worked well in Oregon).

³⁰ See Calve, *supra* note 4, at 15. This *Texas Lawyer's* front page story on uninsured lawyers sent the reader to the continuation of the article at page 15 with a title, "Going Bare: An Effective Deterrent." It quotes the chair of the ABA's General Practice Section,

Legal malpractice begins with law school and continues with mandatory continuing legal education (CLE) programs for lawyers.³¹ The ABA, the only accrediting group for the nation's 179 law schools,³² requires only one course for all the law schools: ethics, which may also be called "professional responsibility" or "the legal profession."³³ The overwhelming majority of the disciplinary complaints are actually grounded in legal malpractice which, in turn, constitutes ethical violations,³⁴ but no law school requires that the ethics course include a legal malpractice component or that students also take a legal malpractice course. Incredibly, only three law schools even offer legal

Dallas solo practitioner John W. Clark, "I've heard of going naked and I know that as a practical matter it works." *Id.*

³¹ See *infra* text at Part V and accompanying notes; see also ABA'S SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR AND THE NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 1995-1996, at 56-57 (1995). Chart XII (Mandatory Continuing Legal Education) lists the requirements for all the states, the District of Columbia, and the United States Territories. The chart notes that 41 states now force lawyers to take CLE courses. Thirty-two of those states have a mandatory ethics requirement, but only two states, Arizona and North Carolina, require lawyers to take a legal malpractice course. *Id.*

³² See Ken Myers, *Settlements Will Mean Changes in ABA's Accreditation Process*, NAT'L L.J., July 10, 1995, at A15.

The accreditation process [is] conducted by the ABA, under the authority of the United States Department of Education and the supreme courts of all . . . 50 states. . . . Law schools must apply to the ABA for accreditation and, once accredited, re-apply every seven years. Both processes require rigorous self-studies by the schools, intensive reporting and documenting of statistics, and visits by site evaluation teams.

Id.

³³ See Deborah L. Rhode, *Ethics By the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 (1992).

³⁴ See MCKAY REPORT, *supra* note 15, at 33.

The overwhelming majority of complaints made against lawyers allege instances of minor misconduct, minor neglect or minor incompetence. Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. Complaints alleging minor neglect or minor incompetence are almost always dismissed. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system.

Id.

malpractice as an elective course:³⁵ Rutgers (Newark),³⁶ Southwestern (Los Angeles)³⁷ and Tulane (New Orleans).³⁸

Legal ethics scholars complain that just over one percent of casebooks in other law school courses ever address ethical issues.³⁹ Most law professors marginalize ethics because "it's not my course" and do not teach it at all.⁴⁰ The situation is even worse regarding legal malpractice. It is rare that legal malpractice is even mentioned either in any law school course casebooks or in class. Even in the ethics casebooks often less than one percent of the content includes any mention of legal malpractice.⁴¹ Moreover, what is mentioned is

³⁵ See Ramos, *supra* note 9, at 1658 n.2; see also Letter from Professor Francis M. Hanna to Manuel Ramos at 1 (Sept. 21, 1995) (on file with the author). Professor Hanna for the last six years has taught a professional malpractice course at the University of Missouri-Kansas City Law School. He writes, "I spend only about a month on legal malpractice and then move into medical malpractice in October." *Id.*

³⁶ See Letter from Professor John Leubsdorf to Manuel Ramos at 1 (Oct. 6, 1995) (on file with author). Professor Leubsdorf is the main drafter of Chapter 4 of the *Restatement of the Law Governing Lawyers*, covering legal malpractice. See RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 71-79 (Tentative Draft No. 7, 1994). In his letter, Professor Leubsdorf writes, "Many thanks for your interesting materials. I'm taking the plunge and will teach a malpractice course next term." Letter from Professor John Leubsdorf, *supra*.

³⁷ See Letter from Professor James M. Fischer to Manuel Ramos at 1 (Mar. 1, 1995) (on file with the author). Southwestern University Law School Professor Fischer taught "Avoiding & Preventing Legal Malpractice Seminar" for the first time in the spring term of 1995. He writes, "You can add one more school to your list of law schools offering a course in legal malpractice—actually some might say law school is itself an example of legal malpractice but that's another letter." *Id.*

³⁸ See Ramos, *supra* note 9, at 1658 n.2 (noting that law schools at the University of Toledo, University of Denver, and Stetson University once offered a legal malpractice seminar). I taught Stetson's and Tulane's first legal malpractice seminars in the fall 1994 and 1995 semesters, respectively. I also will be teaching legal malpractice as part of Tulane's three-credit mandatory "ethics" course for Tulane's first-year second semester law students.

³⁹ See Rhode, *supra* note 33, at 41.

⁴⁰ See *id.* at 40.

⁴¹ See ROBERT H. ARONSON, ET AL., PROFESSIONAL RESPONSIBILITY: PROBLEMS, CASES, AND MATERIALS (2d ed. 1995) (24 out of 519 pages); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (4th ed. 1995) (60 out of 921 pages); GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING (2d ed. 1994) (19 out of 1,151 pages); GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (3d ed. 1994) (four out of 585 pages); MAYNARD E. PIRSIG & KENNETH F. KIRWIN, PROFESSIONAL RESPONSIBILITY: CASES AND MATERIALS (4th ed. 1984) (27 out of 591 pages); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (6th ed. 1995) (seven out of 594 pages); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY

grossly inaccurate and misleading and adopts the ABA's and the insurance companies' "spin" that legal malpractice is not a significant problem.⁴²

Legal malpractice is yet another example of the "growing disjunction between legal education and the legal profession."⁴³ If the legal profession is

THE PERVERSIVE METHOD (1994) (six out of 860 pages); DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* (2d ed. 1995) (14 out of 932 pages); MORTIMER D. SCHWARTZ, ET AL., *PROBLEMS IN LEGAL ETHICS* (3d ed. 1992) (22 out of 393 pages); ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION* (3d ed. 1994) (20 out of 823 pages); JOHN F. SUTTON, JR. & JOHN S. DZIENKOWSKI, *CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS* (1989) (34 out of 830 pages); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986) (20 out of 1006 pages); RICHARD A. ZITRIN & CAROL M. LANGFORD, *LEGAL ETHICS AND THE PRACTICE OF LAW* (1995) (three out of 641 pages).

⁴² See Schneider, *supra* note 23, at 45; see also Ramos, *supra* note 9, at 1675 (citing insurance statistics showing that 50% to 70% of claims settle with no indemnity payment but failing to show that lawsuits and particularly jury trials are significantly more successful).

⁴³ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2191-94 (1993) [hereinafter Edwards, *Disjunction: Postscript*]. Judge Edwards, now the Chief Circuit Judge for the United States Court of Appeals for the District of Columbia Circuit, a former lawyer and former tenured law professor at Harvard and Michigan, comments that his prior article, Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) [hereinafter Edwards, *Disjunction*], generated a response that "has been nothing short of extraordinary." *Id.* Judge Edwards' thesis is as follows:

I fear that our law schools and law firms are moving in opposite directions. The schools should be training ethical practitioners and producing scholarship that judges, legislators, and practitioners can use. The firms should be ensuring that associates and partners practice law in an ethical manner. But many law schools—especially the so-called 'elite' ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy. Many law firms have also abandoned *their* place, by pursuing profit above all else. While the schools are moving toward pure theory, the firms are moving toward pure commerce, and the middle ground—ethical practice—has been deserted by both.

Id. at 34. Judge Edwards' *Postscript* article was one of many in the Michigan Law Review's Symposium issue devoted to addressing the issue. "Almost all those from whom I have heard agree that the legal community faces a significant problem. . . . [L]aw schools have held or are planning to hold special seminars, faculty retreats, and other programs to debate the issues that are the subject of the article." Edwards, *Disjunction: Postscript*, *supra* at 2193; see also Ted Gest, *Doing Good Is Doing Well*, U.S. NEWS & WORLD REP., Mar. 22, 1993, at 60; Eva M. Rodriguez, *Critical of Legal Studies*, LEGAL TIMES, Nov. 30, 1992, at

indeed interested in "a lawyer regulatory system that is more open, accessible, responsive and responsible,"⁴⁴ then it should support, not oppose, mandatory legal malpractice insurance,⁴⁵ abolish secret legal malpractice settlements,⁴⁶ augment the teaching of legal ethics with a mandatory legal malpractice course and allow more lawyers to teach.⁴⁷

Legal malpractice and not ethical discipline is the overwhelming reality in law practice.⁴⁸ Increasingly, legal malpractice includes liability for a lawyer's

6; Junda Woo, *Judge Charges Law Schools Lack Practical Teaching and Research*, WALL ST. J., Dec. 29, 1992, at B6.

⁴⁴ Charlotte K. Stretch, *Lawyer Regulation in the 1990s: Creating a System That Is More Open, Accessible, Responsive and Responsible*, BAR LEADER, Mar.-Apr. 1995, at 21. In 1990, Raymond Trombadore, who became the Commission's chair after the death of Professor Robert McKay, reflected on the *McKay Report* and remarked that the Commission had "asked the profession to take a fresh look at what we can do for the public and for lawyers, by generating a regulatory system that is more open, accessible, responsive, and responsible." *Id.*

⁴⁵ See Schneider, *supra* note 23, at 45.

⁴⁶ See Ramos, *supra* note 19, at 2623.

⁴⁷ See Stephen A. Holmes, *Justice Dept. Forces Changes in Law School Accreditation*, N.Y. TIMES, June 28, 1995, at A1.

Under pressure from the Justice Department's anti-trust division, the ABA agreed to change the way it bestows approval on law schools. . . . In addition to inflating salaries for faculty members and others, the Justice Department complaint said, the lawyer's group [ABA] also required schools to maintain a ratio of 20 students to each faculty member. But it did not allow schools to count administrators who teach classes, or part-time teachers—other lawyers or judges, for example—when computing the ratio. As a result, the number of full time faculty members that had to be hired was increased.

Id. Thus, it appears that law schools, particularly the "less elite" law schools, will be allowing more lawyers and judges to teach law students practice as opposed to theory.

⁴⁸ See Larry J. Doherty, *Legal Profession, Not Tort Law, the Real Problem*, HOUSTON CHRON., Sept. 15, 1995, at 39. In this op-ed piece, a leading Houston plaintiff's legal malpractice lawyer writes:

Make no mistake, there is need for change, and that need has occurred because of the abuses lawyers have inflicted upon the public trust. . . . [T]he legal profession must demonstrate that it is capable of self-regulation or give it up. We have a relatively new method through aggressive legal malpractice litigation.

. . . .

[I]t has grown to fill the need for an internal check against bad or unscrupulous lawyering. The legal profession can recapture the public trust and honor the profession by publicly demonstrating that it will protect the public from errant members of our own profession.

breach of ethical standards.⁴⁹ The failure to recognize a client's legal malpractice claim against another lawyer is also legal malpractice.

Elsewhere I have criticized prior research by the ABA⁵⁰ and shown how the incidence and severity of legal malpractice have grown logarithmically;⁵¹ that lawyers who currently face legal malpractice claims by every category—law schools attended, practice area, firm size, Martindale-Hubbell rating, age, experience, disciplinary history, and rural or urban practice—are representative

Three actions would help alleviate the legal system's problems: (1) the diligent self-regulation of the legal profession through legal malpractice litigation; (2) the requirement for lawyers and/or their firms to carry legal malpractice insurance; (3) the removal of the disciplinary regulation of lawyers from the State Bar Association to the Attorney General's office.

....

[R]emoval of these disciplinary functions to the Texas Attorney General will put this important, meaningful regulation of the legal community within the hands of better paid, more motivated, better qualified, competent attorneys hired to prosecute meritorious claims.

Id.

⁴⁹ See RESTATEMENT, *supra* note 36, at § 74.

[P]roof of a violation of a rule or statute regulating the conduct of lawyers does not irrebuttably prove negligence or give rise to an implied cause of action for negligence; but a trier of fact applying the standard of care of Subsection (1) may be informed, by instruction and expert testimony, of the content and construction of such a rule or statute.

Id. However, the *Restatement* does note, "Some decisions state that rules define professional duties as a matter of law." *Id.* at § 74 (reporter's note); see also Michael J. Hoover, *The Model Rules of Professional Conduct and Lawyer Malpractice Actions: The Gap Between Code and Common Law Narrows*, 22 NEW ENG. L. REV. 595, 612 (1988) (noting that ethical rule violations regularly lead to civil liability to clients and third parties). See generally David Luban, *Ethics and Malpractice*, 12 MISS. C. L. REV. 151 (1991).

⁵⁰ See, e.g., ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS (1986) [hereinafter ABA STUDY] (providing an examination of 29,227 legal malpractice insurance claims from the early 1980s); see also ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER (1989) [hereinafter ABA DATA] (providing the raw and more detailed data from the same study). But see Ramos, *supra* note 9; Ramos, *supra* note 19.

⁵¹ See Ramos, *supra* note 9 *passim*; Ramos, *supra* note 19.

of all lawyers in general;⁵² and that legal malpractice is reforming both lawyers and law professors.⁵³

This confessional essay approaches legal malpractice in a much more personal and narrative form. Follow the evolution of this one lonely "legal malpractice crusader:" as a law student (Part II), a lawyer (Part III), a lawyer's lawyer (Part IV), a law professor (Part V), and a scholar (Part VI). This personal odyssey through legal education and the legal profession and back to legal education will hopefully make you, like me, cry out for reform.

Unfortunately, most lawyers and law professors will not embrace my views on legal malpractice and reform. They have too much invested in maintaining the status quo. However, the consumer public and law students have much to gain. The tobacco, liquor, gun, nuclear, and other American industries learned never to underestimate the power of a fully informed consumer movement. Imagine what could happen once fully informed consumers target the legal profession and legal education.

II. THE LAW STUDENT: "DO I HAVE TO GRADUATE?"

What does the ABA say about its accredited law schools? "The public knows that students who graduate from an ABA school are competent to represent someone whose property, liberty or life may be at stake," says Darryl Priest, the ABA's general counsel.⁵⁴ Like many things that come out of the ABA, this statement is good public relations, but not necessarily true.

In the mid-1970s, like many law students today, I had serious doubts about going to law school. My first choice was to continue the ground-breaking research I was doing as a Yale College student,⁵⁵ conducting empirical and ethnographic research on the nation's "drug problem."⁵⁶ Also, I did very well

⁵² See Manuel Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 48 FLA. L. REV. 1 (1995).

⁵³ See Ramos, *supra* note 19.

⁵⁴ See Holmes, *supra* note 47, at A1.

⁵⁵ See, e.g., Robert Curvin, *An Old Way to Help Addicts*, N.Y. TIMES, July 11, 1981, at A22 (citing my research on the fate of drug addicts who attended New Haven's morphine maintenance clinic between 1918-1920). "Given the failure of today's law enforcement strategies to control heroin addiction, the modest New Haven experiment is worth pondering." *Id.*; see also *Addicts' Progress*, SCIENTIFIC AMERICAN, July 1981, at 84 ("Opiate addiction . . . did not necessarily lead to a quick catastrophic death or to lifelong addiction."); *Natural History of Opiate Addiction*, THE LANCET, Aug. 22, 1981, at 404 (same). "[M]any people will mature out of addiction even without the aid of treatment." *Id.*

⁵⁶ See *id.*; see also David F. Musto, M.D. & Manuel R. Ramos, *Notes on American Medical History: A Follow Up Study of the New Haven Morphine Maintenance Clinic of 1920*, 304 NEW ENG. J. MED. 1071 (1981); Manuel Ramos, *Going Straight or Staying*

at Yale, graduating *magna cum laude* after only two and one-half years of courses.

After a Ph.D. in Sociology or Urban Anthropology, then, I thought I would settle in as a university professor, author, and policymaker and change the world for the better. However, my Yale colleagues, most of whom already had Ph.D.'s from Harvard and Yale, citing an abysmal job market, persuaded me to apply to law school instead of graduate school. They said that, as a law professor, I could continue to pursue my sociological interests, that the J.D. degree was only three years instead of four years for a Ph.D., and that law professors got paid two to three times more than college professors.

My misgivings about the legal profession began before law school. Prior to attending the University of Virginia Law School (UVA), I had never met a lawyer. I never saw the inside of a law office until after I took the California bar exam.

The first day of school, in Torts class, I could not figure out how a "tort" (obviously some type of American pastry) had anything to do with the law. Professor Marshall Shapo, now at Northwestern Law School, began the class by asking, "How many of you came to law school—now, everyone be honest—to make lots of money?" Virtually the entire class of 100 students, except me, raised their hands.

Twenty years ago, there were around 1,000 UVA law students, but I met no other Latinos. UVA had only a few African-Americans. At least UVA had many more women students than Yale, which had just gone coed.

The UVA law faculty was virtually all white and male.⁵⁷ The law was just another world and way too alien. However, I was different, I was there as a sociologist, incognito, a participant-observer making mental notes regarding the socialization of law students and lawyers at one of the nation's preeminent law schools.

Deviant?: The Social Evolution of a Natural Group of Drug Users (1974) (unpublished B.A. dissertation, Yale University, recipient of Yale's Wrexham Prize for best senior thesis) (on file with author); Manuel R. Ramos, *The Hippies: Where Are They Now?*, in *DRUGS AND THE YOUTH CULTURE* 223-47 (FRANK R. SCARPITTI & SUSAN K. DATESMAN, eds. 1980); Manuel Ramos & Leroy C. Gould, Ph.D., *Where Have All the Flower Children Gone? A Five-Year Follow Up of a Natural Group of Drug Users*, 8 *J. DRUG ISSUES* 75 (1978). The data from these studies supported the thesis that the overwhelming majority of drug users "naturally go straight." Their fate can be more easily explained through situational factors, such as the inevitability that adolescent peer groups disintegrate, than the less important physiological dependency on drugs.

⁵⁷ See John J. Siegfried & Charles E. Scott, *The Economic Status of Academic Lawyers*, 1 *LEGAL ECON.* 26, 27 (1976) (noting that in 1973 the typical law professor was white (98.4%), male (94.9%), age 43, and had been out of law school for 14 years).

I had other ways to cope as well. Luckily, like Yale, UVA basically had no required courses. After a semester of Torts, Contracts, Property, Civil Procedure, and Administrative Law, we had the option of dropping any one of the courses. I dropped them all. Everyone knew that law school had little to do with the actual practice of law. I had heard that studies existed showing how graduate students in California who had not gone to law school, but who participated in the six-week "cram" bar review course, actually passed the California bar exam.⁵⁸

After only one semester of required courses, for the next two and one-half years, I did my time and had the student loans subsidize my carefree lifestyle and free-lance writing. I mostly took seminars in sociology, psychiatry, delinquency, dangerousness, poverty law, and international terrorism; or courses that did not require an exam or attendance, but a quick and easy research paper.⁵⁹

There were stories of UVA law students holding full-time jobs in New York or Washington, D.C. and never attending class. They borrowed lecture notes, took exams during vacations, and received the same J.D. as everyone else. UVA Law School did not rank students. Academically, everyone did quite well.

Socially, I coped by becoming a regular at the Mousetrap, a popular bar with live music in Charlottesville and just a short, downhill walk to my one-room apartment. I spent more time at the Mousetrap than at law school. There were long conversations with waitresses, bartenders, writers, graduate students, actors, construction workers, musicians, and even a lawyer or two. I even met Thomas Jefferson's great-great-great-grandson, Rob Coles, an actor who looked just like President Jefferson's statues around the UVA campus.

My "significant other" was a Mousetrap waitress, who then became the fifth generation, but first woman in her family, to attend the UVA Law School and practice law. She became a prosecutor. Few law students frequented the Mousetrap. However, years later, several of my Mousetrap friends, citing me as their "role model," figured that law school could not be all that difficult, and they too went to law school and became lawyers.

What about legal malpractice? It was never mentioned in any of the classes or by any of the law professors or students. We studied about everyone else getting sued: the doctors, the psychiatrists, business people, companies, criminals, and trespassers. Everyone was the target of a suit, it seemed, except lawyers. It was after Watergate, so we were the first generation of lawyers

⁵⁸ I have never been able to track down these studies. However, the graduate students could not practice law because they did not attend or graduate from law school.

⁵⁹ The research papers were often written and mailed from my home in Ocean Beach, a seaside community in San Diego, California, where I lived during the summers.

subjected to the ABA-required mandatory ethics course. There was probably no mention of legal malpractice, but I was never there and remember little about the one credit course.

Much like today, a student did well in the ethics course by doing "an all-nighter" before the exam, memorizing key passages of the ABA ethics code and taking the moral high ground in writing the answers to the exam.⁶⁰ We just assumed that no lawyers,⁶¹ particularly those that went to the top law schools, were ever disciplined.⁶² The ethics course not too surprisingly continues to be

⁶⁰ See Rhode, *supra* note 33, at 41.

⁶¹ See *supra* note 12 and accompanying text (noting that in 1991 there was only a 0.003% chance that a lawyer in private practice would lose his or her license temporarily or permanently as a result of an ethical violation and disciplinary action).

⁶² See, e.g., Nancy McCarthy, *Legal Ethics: Just Who is Responsible?*, CAL. BAR J. Oct. 1995, at 27. The following table is based on data provided by the article. The ranking and percentage columns, while based on the data in the article, are presented here for the first time. The data is based on a search of 900 California lawyers who were in any way disciplined between January 1994 and August 1995.

TABLE 2. CALIFORNIA LAW SCHOOL ALUMNI DISCIPLINE

Rank	Law School	Percentage of Alumni Disciplined	Number of Alumni Disciplined	Number of Alumni in Cal.	Accreditation
1	U.C. Davis	.18	5	2,782	ABA
2	Stanford	.37	11	3,003	ABA
3	McGeorge	.43	24	5,595	ABA
4	U. S.F.	.46	18	3,908	ABA
5	Santa Clara	.47	21	4,471	ABA
6	U.C. Berkeley (Boalt)	.49	31	6,381	ABA
7	U. San Diego	.53	25	4,706	ABA
8	UCLA	.62	42	6,837	ABA
9	Loyola	.67	51	7,571	ABA
10	U.C. Hastings	.69	67	9,681	ABA
11	J.F.K. U.	.70	3	427	CBE
12	Cal. Western	.80	19	2,379	ABA
13	Golden Gate	.80	24	3,013	ABA
14	Humphreys	.83	3	361	CBE
15	Pepperdine	.83	21	2,542	CBE
16	Whittier	.88	14	1,583	ABA
17	USC	.95	46	4,838	ABA

Rank	Law School	Percentage of Alumni Disciplined	Number of Alumni Disciplined	Number of Alumni in Cal.	Accreditation
18	Cal. Southern	1.10	2	182	None
19	New College of Cal.	1.24	4	322	CBE
20	Southwestern	1.24	79	6,386	ABA
21	San Francisco	1.30	11	843	CBE
22	Western State	1.31	89	6,759	CBE
23	U. LaVerne at LaVerne	1.35	9	666	CBE
24	American	1.57	2	127	None
25	U. West L.A.	1.63	20	1,222	CBE
26	Peoples	2.02	2	99	None
27	U. LaVerne at Woodland Hills	2.37	38	1,604	CBE
28	Glendale	3.23	14	433	CBE
29	Mid Valley	3.70	6	162	None
30	South Bay	8.82	6	68	None

"The American Bar Association accredits 16 law schools in California and another 18 are accredited by the State Bar's Committee of Bar Examiners. Seventeen more law schools operate in the state without any accreditation and six institutions offer correspondence courses." *Id.* at 28. The article further states:

My experience is you are less likely to get discipline cases at large firms," says Kenneth J. Vandeveld, Dean of Western State University at San Diego. It is logical, he says, that schools which produce large numbers of sole practitioners may have more graduates disciplined. "Law schools fill particular niches," he explains. "Some are feeders for major firms and some produce a lot of sole practitioners."

Id. But see Donald R. Fischbach, *No Targets in Bar Discipline System: Despite a Perception That the State Bar Focuses on Sole and Small Firm Lawyers, A Look Into the System Shows Otherwise*, CAL. BAR J., June 1995, at 14. Over a five-month period in 1994, the California State Bar conducted an in-house random survey to determine the firm size and practice areas of lawyers being complained about on its toll free telephone line. It found: "Sixty-nine percent of the complaints involved solo practitioners, 23[%] involved lawyers in small firms (2-5 attorneys) and eight percent of the complaints dealt with attorneys in firms of six or more lawyers." *Id.* The State Bar then reviewed all files between January 1, and May 30, 1994 and determined the firm size and practice area for each respondent. "The results showed that of the actions taken against attorneys, 55% were solo practitioners, 29% practiced in small (2-5 lawyers) firms and 16% worked in large (six or more attorneys) firms." *Id.* However, the California study did not show the firm size or practice areas of lawyers who had been suspended or disbarred. Dispositions in the study only included:

the most hated course in the curriculum.⁶³

The course credits quickly added up, and I, albeit reluctantly, graduated, left UVA Law School and the Mousetrap and headed west to San Diego to take the California bar exam. Three years of law school were crammed into a short, six-week bar review course. Like the graduate students who had never taken the courses in law school, I studied hard, often putting in up to eighteen hours a day. I passed the California bar exam, including the recently added ethics portion.

III. THE LAWYER: "SINK OR SWIM"

Suddenly, there I was masquerading as a real lawyer. An impostor,⁶⁴ who after three years of law school, a six-week bar review course and passing the

notice to show cause filed, stipulated discipline filed, resignation tendered with charges pending, agreement in lieu of discipline, admonition, warning letter, and directional letter. *Id.* Are solo practitioners and small firms targeted when it comes to the more severe disciplinary punishments? The specific numbers will have to wait for my pending study, *Lawyer Discipline: Who Gets Axed?* (forthcoming). See also CURRAN & CARSON, *supra* note 12, at 47. The breakdown, by firm size of lawyers practicing in California, according to the latest data, is as follows: solo practitioner (47.9%), 2-5 lawyer firm (10.8%) and six or more lawyers in a firm (41.3%). *Id.* Thus, when 84% of the discipline in California is meted out to the 58.7% of lawyers who are solo practitioners or in small firms, a disproportionate focus certainly does exist. Also, as seen in Table 2, *supra*, the better one's law school, the better one's chance of avoiding discipline.

⁶³ See Rhode, *supra* note 33, at 40 ("As the author of a 1991 overview puts it, professional responsibility is the 'dog of the law school [curriculum]—hard to teach, disappointing to take, and often presented to vacant seats or vacant minds.'").

⁶⁴ See Benjamin Sells, *Practicing Law and the Fear of Being Exposed As an Impostor*, FLA. BAR NEWS, Sept. 1, 1995, at 25.

[T]he impostor syndrome is a widespread phenomenon within the legal profession.

....

In the early years of practice I encountered the impostor syndrome often. Just about every time I got a new assignment, in fact. I mean I felt like I never knew what was going on. A partner would start talking about "letters of credit" or some such thing and I would nod knowingly. . . .

The roots of the impostor syndrome begin in law school where lawyers are taught it is better to bluff than to admit ignorance.

. . . Certainly the impostor syndrome contributes to the already high legal fees by perpetuating face-saving battles and leaving lawyers to reinvent the wheel because they are unwilling to ask help from more knowledgeable people. Far worse is the internal toll the syndrome takes on the lawyer. At first the lawyer merely feels inadequate and dishonest. But the next step is cynicism. The lawyer decides everyone else is faking it,

bar exam, knew absolutely nothing about representing a real client in a real lawsuit. So I took a short detour: a stint as a staff attorney at the United States Commission on Civil Rights, in Washington, D.C., where I interviewed judges, prosecutors, directors of shelters, and contributed to a study on the legal system's response, or lack of response, to battered women.⁶⁵

But now I was in one of San Diego's premier corporate law firms. There, on the stationery, at the very bottom, was my name. At the top were the dead partners' names, then the seventy-year old partners, the sixty-year old partners, the fifty-year old "junior" partners on down through the senior associates and then me, the last one.⁶⁶

The first-year associates at the law firm consoled each other and compared notes. All of us were graduates of the top law schools in the country. We had no clue whatsoever what the supervising lawyers were talking about. None of us had ever seen a complaint, answer, interrogatory, deposition, or points and authorities in support or against this or that motion. We were terrified at times, but we quickly learned, ironically, from each other. The fear of asking a dumb question led to no questions for the supervising partners.⁶⁷

The supervising partners did not enjoy supervision. The time could not be billed. They seemed too busy, anyway, except to make sure that the monthly computerized billable hours printouts on associates were satisfactory.⁶⁸ We

too, and begins to relate with people on the assumption everyone is lying and posturing. This wreaks havoc on the lawyer's relationships.

Id.

⁶⁵ See UNITED STATES COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE (1982).

⁶⁶ See ANTHONY E. DAVIS, RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS 5 (1995).

Inevitably, as firms grew larger, they started to develop the outward trappings of large corporations. . . . The success of this process of enlargement frequently depended on the ability to charge clients for the work of a team of recently admitted associates, a business structure referred to as "leverage." The higher the ratio of associates to partners, the greater the firm's projected profitability. . . . [Such a structure] increased the pressures on partners and associates to treat their profession as a "means of livelihood" rather than as "a calling in the spirit of public service."

Id.

⁶⁷ See, e.g., Sells, *supra* note 64, at 25.

⁶⁸ See DAVIS, *supra* note 66, at 5.

This movement among many firms toward the corporate model of economic organization lacked a crucial component: *management* of the professional element of

worked very hard, but, for me, there was light at the end of the tunnel. After all, I was still a sociologist, a participant-observer doing the obligatory two to three years of law practice before becoming a law professor and scholar.

During those early years as a lawyer, mistakes were made, but nobody talked about them. Supervisors did not supervise, so they never noticed. Clients were either not sophisticated, or even if they were, they were still unable to recognize the mistakes. Sometimes the mistakes were corrected, but since over ninety percent of the cases settled, or never reached trial,⁶⁹ mistakes were simply swept away with the settlement agreement.

law practice. . . . Even within large firms, the practice remained essentially a series of little "cottage industries" under a collective umbrella. More pejoratively, these are often referred to as "fiefdoms." To the greatest extent feasible, every lawyer, or at least every partner in these growing institutions, jealously guarded his or her individual independence from the control of the organization and the other partners. . . . [E]ach clustered around a practice group—at whose separate cores is a "rainmaker" responsible for that group's clients. . . . [T]his model of large firms lacking effective central management (other than financial and fiscal oversight) has become predominant.

Id.; see also Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 373 (1995) ("Law firm principals are rethinking whether their firms should operate as a team with accountability, or as a confederation of autonomous practitioners sharing offices.").

⁶⁹ See BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPT. OF JUSTICE CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (July 1995) [hereinafter CIVIL JUSTICE SURVEY]. The Justice Department and the National Center for State Courts' three-year study included 762,000 civil cases that were disposed of in the nation's 75 largest counties between June 30, 1991 and June 30, 1992. *Id.* at 1. It is the most complete analysis of civil cases ever conducted. See Goerdt, *supra* note 20, at 5 (referring to the survey as "the most ambitious investigation thus far of civil justice in the United States[] . . . [which] allows us to draw a more detailed map of the civil litigation landscape than has been possible before."). The survey found that only two percent of the cases ever reached a jury trial. See *supra*, CIVIL JUSTICE SURVEY at 2. The remaining 98% of cases, or 750,000, were disposed of as follows:

TABLE 3. DISPOSITION OF CIVIL CASES, 1992

Disposition	Number of Cases	Percentage of Non-Jury Cases
Agreed Settlement	470,000	62.7
Default Judgment	108,000	14.4
Dismissed*	82,000	10.9

We never had any thought or talk of legal malpractice. No one ever got sued for legal malpractice.⁷⁰ No one ever got disciplined.⁷¹

Office politics, romances and lawyer talk and most of all, work, filled our days. In the "sink or swim" environment, none of the associates "sunk," but most of us did "swim," albeit with a short detour for me,⁷² to other lawyer jobs.

IV. THE LAWYER'S LAWYER: THE MALIGNANCIES

I sent my resume to a blind advertisement. Two days later, I was interviewed for an associate position with Lewis, D'Amato, Brisbois & Bisgaard. "All you do is defend lawyers sued for legal malpractice?" I was shocked. First, this was the earliest I can remember talking to anybody about legal malpractice. Second, here was Alan Greenberg, a Columbia Law School graduate, just a couple of years older than me. He was a partner from the then small Los Angeles-based law firm, a recent break-off from a much bigger law firm, doing nothing but legal malpractice defense work. Alan was sent down by his partners, who had already opened a San Francisco office, to start the one in San Diego. It was just Alan, me and one secretary.

Disposition	Number of Cases	Percentage of Non-Jury Cases
Bench Trial, Arbitration Awards, Directed Verdicts, Others	33,000	4.4
Transfers	29,000	3.9
Summary Judgment	28,000	3.7

*Cases that are voluntarily dismissed are usually as a result of a confidential settlement. Thus, the total settlement figure may be as high as 75%. *See also* Goerd, *supra* note 20.

⁷⁰ Only the partners would have known if anyone got sued for legal malpractice.

⁷¹ *See* McCarthy, *supra* note 62.

⁷² *See* Laurel Sorenson, *Lawyers Are Increasingly Changing Careers Amid Job Glut, Dissatisfaction With Work*, WALL ST. J., Apr. 29, 1982, at 31.

When Manuel Ramos helped a bank get a \$500 out-of-court settlement of a woman's claim for \$40,000, he likewise was disturbed. The woman claimed the bank mismanaged her funds, and Mr. Ramos agreed. "Personally, I felt the bank made a mistake," he says, "but my job was to defend them." Last December, he stopped defending them to travel and do some free-lance writing. A survey found 40% of younger lawyers dissatisfied. "It's the boredom, the long working hours, the pressure to get clients," says the head of a recruiting and counseling service.

Five years later, Alan, Bob Smith (a Harvard Law School graduate and partner from Los Angeles), and I, all of us in our early thirties, headed up a San Diego office that now consisted of almost sixty lawyers and as many staff. Over a hundred persons were earning a good living by defending lawyers in legal malpractice cases in one medium-sized American city. In ten years, our Los Angeles-based California firm grew from seven to over two hundred lawyers and as many staff in five California offices. Legal malpractice was very good to us.

Few lawyers have been involved so intimately in the lives and practices of so many other lawyers. For ten years I was a lawyer's lawyer, representing lawyer defendants in over nine hundred cases. The cases ranged from \$100 million securities fraud cases to five-figure "slip and fall" missed statute of limitations claims. My clients came from solo practice, small firms, medium firms, and nationally recognized mega-firms of over five hundred lawyers. In addition to my lawyer clients, I met hundreds of plaintiff's lawyers and hundreds of plaintiff and defense expert witness lawyers. There were also the hundreds of lawyers in my own law firm, scores of fellow partners, and scores of up-and-coming associates whom I hired, trained, and supervised.

The ten years of defending lawyers for over twenty insurance companies were like a roller coaster ride. At times there was no way I would want to get off. Other times the "golden handcuffs" kept me on board. Here was someone barely ten years out of law school, in his thirties who "had it made." A beautiful and wonderful wife, a former international model from Dublin, Ireland, and four children. There was the million dollar house, the horses, the most expensive Mercedes, the live-in maid and gardener, the European vacations, and the admiration and envy of your lawyer peers—the archetypical Southern California lifestyle.

However, to continue with the roller coaster analogy, there were times, at the very bottom, when my stomach and mind suffered from nausea. Burned-out and exhausted, I wondered how our young firm, how such a group of smart and idealistic lawyers allowed the pursuit of profit to erase any semblance of professionalism, public service, competence, and ethical standards.

I feared we might become a typical "win at any cost," "eat what you kill" and "bill all you can" big law firm.⁷³ In these firms, ethics are for academics

⁷³ See Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2109 (1993). Responding to Judge Edwards' article, *Disjunction*, *supra* note 43, Gordon, a Stanford law professor, accurately observes:

For what he perceives to be the deplorable ethical condition of the practicing bar, the Judge's remedy is exactly the same: more doctrinal teaching—informed, naturally, by more doctrinal scholarship—in the law schools! This is a bit like trying to clean up

and associates may not be properly trained or supervised, because non-billable hours do not add to the bottom line. Pro-bono work may be viewed as a "waste" because it too, incurs non-billable time. In such firms, unethical and incompetent associates can make partner because they are good, slick sales persons or "rainmakers." Partners have their "fiefdoms" and their work and practices can not be reviewed by other partners.⁷⁴ Associates and supervising

the Augean stables with a teaspoon. If ethical misconduct of the grossest kind is in fact increasing—and there is a widespread view among judges and bar leaders that it is—the reasons for the increase are, as pointed out before, structural and systemic, a function of sharply increased competition among firms for business, and among lawyers within firms for a share of "you eat what you kill" compensation. To hold and attract litigation clients nowadays, a law firm and lawyers within the firm have to acquire a reputation as killer, big-winner litigators. In a big case, the temptations to conceal documents, abuse discovery, make strategic use of sanctions, distort precedent, and ignore harm done to third parties and the public interest are immense. It is not surprising that partners and associates should sometimes give in to them; or that some firms should gradually develop an ethical culture in which, because "everybody does it," doing it is just tit-for-tat behavior in the jungle where one must try to survive. In the abstract every lawyer involved may know at some level that this sort of behavior is "wrong"—but the capacity for denial and rationalization when large interests are at stake is very great.

Id.

⁷⁴ See Fortney, *supra* note 68, at 363.

In 1985 the ALI-ABA authorized the Williamsburg Peer Review Conference to consider the bar's rejection of peer review and to consider other approaches to quality evaluation. . . . In March 1988, the ALI-ABA authorized the Peer Review Project to investigate the feasibility of a neutral self-assessment model for use by practitioners. . . . As indicated by the name change, the project was reformulated as a program of self-evaluation with "the peer being the lawyer's conscience."

Id.; see also DAVIS, *supra* note 66, at 6–10. Commenting on the \$2 billion Lincoln Savings & Loan Association loss and the government's \$275 million legal malpractice claim against the large New York law firm of Kaye, Scholer, Fierman, Hayes & Handler, which was eventually settled for \$41 million, Davis notes:

The fundamental problem that the Kaye, Scholer case highlights so neatly was the absence within the firm of any independent management authority capable of enforcing uniform standards of client intake and supervision over its most prestigious, powerful, and profitable partner. Indeed, the Kaye, Scholer case may be the paradigm of the consequences of the cottage industry system of law firm management. Of course, Kaye, Scholer and its supporters may continue to view the debate as being about the freedom to practice law "zealously," according to litigators' rules and standards. But if they had in place a central management office with the accepted authority to review [partner]

partners, alike, in many of these firms, may also pad their hours,⁷⁵ lie to clients, lie to each other, or lie to themselves.⁷⁶ Everyone, including clients may lie.⁷⁷ Overworked and underpaid but 'wined and dined' adjusters in

Fishbein's decisions at the intake level, and to impose and apply a peer review program that created a collegial rather than a cottage industry mind-set, the firm might have fared very differently, even had it taken on the Lincoln representation on its own terms.

Id.; David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1147, 1196 (1993) ("The Kaye, Scholer partner in charge [Peter M. Fishbein] of the firm's work for Lincoln was a lifelong litigator *who had never previously represented a federally insured institution.*") (emphasis added).

⁷⁵ See Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 705-20 (1990). Although based on only twenty interviews, Professor Lerman catalogs a disturbing list of common-place deceptions, beginning with billing practices, padding bills, and settling clients' claims for less than what they are worth to accelerate the receipt of a fee. *Id.*

⁷⁶ See *id.*; see also Frederick Miller, "If You Can't Trust Your Lawyer . . .?", 138 U. PA. L. REV. 785, 785 (1990). In this article, the executive director of and counsel for the New York Clients Security Fund explains:

Of course lawyers lie. Some lawyers. They do it daily in their pleadings and in their briefs—to their clients and to their colleagues and to the courts. And, of course, clients lie to their lawyers. Some clients. . . . There is also widespread reluctance on the part of lawyers—again, some lawyers—to discuss publicly, much less acknowledge, that they have colleagues who engage in deceit and unprofessional conduct.

Id.

⁷⁷ See JAMES PATTERSON & PETER KIM, *THE DAY AMERICA TOLD THE TRUTH* 45 (1991) (noting that ninety-one percent of Americans admit lying regularly, mostly to those they know best); Mark Curriden, *The Lies Have It: Judges Maintain That Perjury Is on the Rise, But The Court System May Not Have Enough Resources to Stem the Tide*, A.B.A. J. 68, 69 (May 1995). A survey of over 50 state and federal judges, lawyers, and academics by the ABA Journal found around 100 federal perjury cases since 1980. *Id.* The article notes:

Yet judges and others insist that the anecdotal evidence of a growing frequency of perjury is overwhelming.

"It is much more serious a problem than most people believe," says V. Robert Payant, president of the National Judicial College in Reno, Nev. "For the last couple of years, we have been hearing this complaint from more and more of our judges. It's no longer a small twisting of the facts or a little white lie here or there. It's happening in almost every case."

"Why do we expect people to be absolutely honest when their entire economic life or their freedom and liberty relies on it?" asks Geoffrey C. Hazard Jr., director of the American Law Institute in Philadelphia and an expert on legal ethics. "Yes, shading the

faceless "deep pocket" bureaucratic insurance companies with several hundred files may do as they are told and continue paying the bills, often late, but in full and without complaints.⁷⁸

It was easy to see how legal malpractice claims rose exponentially and why twenty-five insurance carriers ceased writing legal malpractice insurance in California during the 1980s.⁷⁹ Once claims settled, insurers quickly realized that for every dollar that a plaintiff victim received in a legal malpractice case, his or her plaintiffs' counsel received between one-third to one-half of the indemnity paid. Moreover, defense lawyers usually got more than the plaintiffs' counsel.⁸⁰ Millions of dollars went to lawyers who sued lawyers and

truth and telling lies occurs in almost every case, I am sure. But we have created this adversarial system that encourages it."

Id.

⁷⁸ See Memorandum from Kirk R. Hall, Professional Liability Fund, on Minimum Financial Responsibility for Lawyers 18 (Aug. 7, 1995) (on file with author). Hall, CEO of Oregon's mandatory insurance program suggests, "some commercial companies . . . are not particularly anxious to decrease the number and severity of claims, which in turn would decrease the total premium charged and the profit to the insurer." *Id.*

⁷⁹ See Mary Ann Galante, *Malpractice Rates Zoom*, NAT'L L.J., June 3, 1985, at 1, 25-26. During a seven year period, catastrophic losses forced 25 legal malpractice insurance carriers to leave California. Nationwide, between 1982 and 1985, 80-90% percent of companies that had written legal malpractice insurance ceased writing it. *Id.*

⁸⁰ See Ramos, *supra* note 19 (noting that in Florida and California defense/plaintiff fees were 30.4%/20.9% and 31.6%/22.8%, respectively); see also CAL. STATE INS. DATA, *supra* note 26. The following table shows California's experience between 1987 and 1993 for insurance claims/lawsuits that closed and were reported by insurers in those years.

TABLE 4. CALIFORNIA'S LEGAL MALPRACTICE: FREQUENCY AND COSTS

Year	Number of Insureds	Number of Claims Closed	Total Indemnity Paid	Total Expenses Paid
1987	N/A	3,242	\$83,267,815	\$40,997,902
1988	N/A	2,904	\$137,650,829	\$68,033,364
1989	22,536	2,805	\$82,314,284	\$40,059,037
1990	36,307	2,478	\$52,668,447	\$30,085,759
1991	36,465	2,825	\$89,303,238	\$60,411,893
1992	23,141	2,610	\$116,882,079	\$72,368,973
1993	31,191	2,701	\$50,503,068	\$27,982,711

lawyers who defended lawyers.⁸¹ With the billable hour there was no incentive whatsoever to settle cases early.⁸²

What types of mistakes created this huge economy based on legal malpractice? Usually they were fairly simple and administrative. Why did it happen? It was rarely because the lawyer was an idiot or grossly incompetent.⁸³ It was usually due to obvious malignant situations:⁸⁴ an

⁸¹ See *id.*

⁸² See, e.g., David D. Rosenstein, *For Whom the Bill Tolls: Quantity Not Quality Becomes the Goal When Hourly Fees Prevail*, A.B.A. J., Nov. 1995, at 1201

A lawyer who undertakes a contingent fee case must either provide a benefit . . . or get nothing. . . . Contrast that to the position of defense lawyers. . . . None of them will get paid very much if there is a quick settlement. All will get paid well for a lengthy and complex litigation, whatever the result.

Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173, 184 (1995). Arizona State Supreme Court Chief Judge Stanley G. Feldman noted that any reform must also "curb the 'paper shuffling, fee churning, intransigent settlement postures'" of defense counsel.

⁸³ See Ramos, *supra* note 9, at 1707.

Unethical or incompetent lawyers are not necessarily the source of legal malpractice. The focus too often is on identifying, eliminating, educating, and rehabilitating only the "bad" lawyers. However, Ronald E. Mallen, the nation's most recognized "lawyers' lawyer" notes, "I get to defend some of the finest lawyers in the country." Similarly Lester L. Rawls, the former chief executive officer of Oregon's PLF, writes: "Of the 1,000 Oregon lawyers who have had claims made against them, I venture to say that very few of those lawyers would be considered bad lawyers. . . . [M]ost are among the finest lawyers in Oregon, and certainly would rank among the finest lawyers in the United States."

Id. at 1707 (citations omitted).

⁸⁴ See *id.* at 1708-09, further noting:

[M]ore attention is being given to how solutions to problems may not necessarily lie within an individual and her willpower or logical and analytical abilities, but instead within the less flattering and less popular situational approach to human behavior.

....

The "bad apples" approach looks for diseased, malignant, or bad individuals, and either tries to cure them or cut them out of the profession. Instead, the situational approach to legal malpractice looks for the diseased, malignant, or bad situations (environmental, bureaucratic, or societal), and attempts to determine how changing those bad situations may facilitate the desired individual behavior.

associate who hurried and was unsupervised, a staff member who was inattentive, a lawyer who was swamped but could not say no to additional cases and potential revenue, or a lawyer who gave "cocktail/curbstone" advice to someone a lawyer never thought was even a client.

Here are examples of just a few of the legal malpractice cases that we handled:

- *The "I forgot" case.* An associate at a large Southern California law firm simply forgets to inform his client, a bank, that an agreement has been reached with the debtor on the postponement of the foreclosure sale for a high-rise office building. The foreclosure occurs and the bank is sued for several million dollars for wrongful foreclosure. The legal malpractice action was for the millions of dollars it took to settle the bank's case and \$500,000 in attorneys' fees and defense costs that the bank also had to pay.

- *The "I misunderstood" case.* A \$3 million dollar lawsuit against one of the best tax lawyers in Southern California arose when the secretary "filed" a critical 1986 Sub S Election document by placing it in an office file instead of mailing it to the IRS. The case cost the insurance carrier \$600,000 in attorneys' fees and costs for a three month jury trial to convince jurors that the plaintiff corporation could still avoid the millions in taxes through other tax loopholes. Plaintiffs, on an hourly fee arrangement, paid over \$500,000 to their lawyers and "won" \$300,000.

- *The "I was just doing a friend a favor" case.* The lawyer client, who had never handled a securities case, wrote a "simple" three paragraph, one page letter for his friend vouching for the legality of the business venture. The letter, used to attract hundreds of unsuspecting third party investors, became the basis of a multi-million dollar securities fraud case.

- *The "I'm not a criminal" case.* This case was featured on CBS's "60 Minutes" and in the *Los Angeles Times*. There were federal criminal indictments, convictions, and prison terms for dozens of lawyers for defrauding the insurance companies through ordinary litigation.⁸⁵ I was the only lawyer

Id. (citations omitted).

⁸⁵ See Myron Levin, *Ex-Lawyer Gets Twelve Year Prison Term in Insurance Scam; Fraud: Lynn Stites Was the Mastermind of a Ring of Attorneys That Used the Court System to Bilk Companies*, L.A. TIMES, Jan. 14, 1994, at B3.

In addition to imposing the prison term of 12 years and seven months, U. S. District Judge Clarence C. Newcomber confirmed a forfeiture verdict allowing the federal government to seize Stites' assets or future earnings of up to \$50 million—the amount insurers supposedly lost because of his crimes.

....

working on the case who was not indicted. Ethically, it was an easy decision. However, I was the only insurance defense counsel; the others were also paid by insurers, but they were "Cumis' counsel."⁸⁶ I told my insurance company client to ignore taking the over fifty plaintiffs' depositions scheduled in exotic locales. Plaintiff investors who had only lost \$5,000 or less were each deposed for two or three days by over twenty defense lawyers who were billing and overbilling insurance companies at the rate of \$200 to \$300 per hour.

• *The "It's the secretary's fault" case.* This matter involved a deadline on an international patent case that was never calendared by either the secretary or the lawyer. The client lost out on millions of dollars of income from outside North America for a revolutionary new drug. The damages were many millions of dollars. Luckily for the insured lawyers and the insurance company, but unlucky for the plaintiff, there was only a \$1 million policy and the plaintiff had no choice but to just take what was available.

• *The "It's the client's fault" case.* Millions of dollars were also at stake in a legal malpractice case that arose from what appeared to be a simple divorce. Our client, formerly an experienced divorce lawyer, followed his client's wishes and failed to hire an expert to evaluate the family business. The client said it was only worth about \$200,000. After the divorce, the husband sold it for over \$2 million.

• *The "It was just cocktail advice" case.* A prostitute sued my lawyer client for giving her erroneous real estate advice during their short half-hour

[The] case . . . emerged as one of the largest criminal prosecutions of lawyers in U. S. history. Prosecutors described it as the largest fraud scheme ever that "involved the use of the United States legal system as a means to defraud insurance companies."

....

A dozen other lawyers previously received sentences ranging from probation and fines to 46 months in prison.

....

Stites and his cohorts, who carried out the scheme between 1984 and 1988, became known as "the Alliance" after a client of one of the lawyers used the term in a conversation secretly taped by a government informant.

Unlike traditional insurance scams involving staged traffic accidents or false medical claims, Stites and his associates were involved in genuine legal disputes. According to prosecutors, what made the scam ingenuous was their use of standard legal procedures—such as legal discovery and the filing of cross claims—to prolong and expand cases for the sole purposes of reaping huge legal fees from insurers obligated to pay legal defense costs for policyholders.

⁸⁶ An insurer's ability to use its insurance defense counsel was significantly altered by a California appellate court case. *See San Diego Fed. Credit Union v. Cumis Ins. Soc'y*, 162 Cal. App. 3d 358, 375 (1984) (obligating insurers to allow insureds their own choice of counsel for litigation if there exists a conflict regarding coverage).

encounter. She was paid. He was not. It never dawned on him that if you give anyone legal advice, it had better be correct. An attorney/client relationship was created as a result of the advice. His malpractice carrier had to pay to settle the case. He also had to pay \$5,000 more for his deductible.

These cases involve credible multi-million dollar claims and millions of dollars in defense costs and settlements against some of the best lawyers in their fields. Simple and dumb mistakes happen. Why? At critical times these lawyers were too busy, too greedy, or too pre-occupied with other matters in their lives to attend to a mundane task. After all, the day-to-day practice of law can become rather monotonous and mind-numbing, especially now that the focus is on specialization.⁸⁷

Most of my time as a partner was spent on the multi-million dollar cases that generated the most fees. However, the overwhelming majority of the 900 cases that I personally handled or supervised were significantly smaller and usually settled for less than \$100,000.⁸⁸

⁸⁷ See David J. Bodney, *Keeping the Flame Alive: A Diverse Practice Sparks Creativity, While Specialization Leads to Dullness*, 81 A.B.A. J. 108 (Sept. 1995).

The conventional wisdom is all wet. Specialization is not the solution, it's the problem. It breeds uniformity. It leads to boredom. It dulls the senses, deadens the lawyer's creative edge and deprives the client of imaginative advice.

....

When the intellectual flame goes out, a lawyer's only challenge becomes the generation of billable hours.

....

If lawyers would experiment more in law and life, the profession would be a happier, saner and ultimately more useful and productive one.

Id.

⁸⁸ See Ramos, *supra* note 9, at app.A; see also CAL. STATE INS. DATA, *supra* note 26. Below is a table of the average indemnity and defense costs paid for California legal malpractice claims reported by insurers between 1987 and 1993 in which the claimant/plaintiff received money:

TABLE 5. CAL. LEGAL MALPRACTICE SETTLEMENT AND DEFENSE COSTS

Year	Number of Claims on Which Indemnity Was Paid	Average Indemnity	Average Defense Costs
1987	1,414	\$58,401	\$80,789
1988	1,726	\$79,904	\$112,842
1989	1,111	\$73,444	\$101,220

The roller coaster ride of being a lawyer's lawyer in Southern California came to a gradual halt upon the realization that I no longer was the observer, but a full-fledged participant in a profession that had gone drastically astray. Professionalism, respect, and trust among counsel was replaced by the "Rambo," "win at any cost,"⁸⁹ "who has the most clients," and "never settle a case until you have wrung it dry of fees" attitudes. Indeed, since 1987, hourly billing defense lawyers in California have been continually receiving more money from the insurance carriers in legal malpractice cases than the plaintiffs (up to two times more) and the contingent fee plaintiff lawyers (up to four times more).⁹⁰ It was a culture of greed, deceit, and rationalization. It was a culture that, not too surprisingly, made it easier to continually increase those billable hours and bring in additional revenues.⁹¹

Year	Number of Claims on Which Indemnity Was Paid	Average Indemnity	Average Defense Costs
1990	1,076	\$70,836	\$103,854
1991	911	\$91,439	\$137,304
1992	861	\$135,142	\$193,991
1993	883	\$85,031	\$124,211

Id.

⁸⁹ See Stuart Taylor, Jr., *Why So Many Lawyer Jokes Ring True*, LEGAL TIMES, Sept. 18, 1995, at 25.

Seattle's 200-lawyer Bogle & Gates withheld smoking-gun documents . . . that were deliberately or recklessly false and intended to deceive. And yet Bogle & Gates was able to find 14 leading litigation and legal ethics experts to swear that its conduct had been ethically impeccable and that it represented standard operating procedure in the adversary system.

Id.

⁹⁰ See CAL. STATE INS. DATA, *supra* note 26. Note how in Table 5, *supra* note 88, the average defense cost is significantly more than the average indemnity paid; the indemnity usually includes the one-third to one-half of plaintiff's counsel's contingent fee. Thus, in 1993, the plaintiff who settled a legal malpractice case received on the average \$56,688, her counsel one-third, or \$28,343 and the defense lawyer after minimal payment for cases and expected fees received something less than \$124,211 for hourly billed fees!

⁹¹ See, e.g., Gordon, *supra* note 73, at 2109; Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 726 (1994).

Despite the best efforts of the older, established bar to resurrect its once-noble image by promulgating new regulations—mandatory continuing legal education, peer review,

Lawyers also made the absolute worst clients.⁹² They made terrible witnesses on the stand. They always looked behind the questions. They looked like they were lying even when they were telling the truth. Jurors continually ruled against them in swearing contests with ex-clients unless there was a written document supporting the lawyer's side of the story.⁹³

Even lawyer-clients were unable to control "their" insurance defense lawyers, who paid more attention to the real client: the insurance company paying the bill on this and hundreds of other cases. Partners were unable to police themselves or their associates.⁹⁴ Lawyers would never inform on each

specialty certification, and high-profile pro-bono services—the world of lawyering has now been largely de-mystified. Worse, best-selling novels and popular motion pictures have validated the public's perception of practitioners as venal, corrupt, and unscrupulous. The lusty and materialistic legal-merchants of *L.A. Law* have replaced yesteryear's low-keyed Perry Mason and high-minded Atticus Finch of *To Kill a Mockingbird*.

Id. (citations omitted); Lerman, *supra* note 75, at 705–11; Miller, *supra* note 76, at 785–87.

⁹² For example, Jeffrey M. Smith says:

[L]awyers are often among the world's worst witnesses.

....

They answer too quickly. They violate many of the rules of testimony they lay down for their own clients. Their worst sin is assuming they know the question, even when the opposing counsel has not yet completed it.

....

Finally, lawyers tend to answer all questions—even if there is no factual basis for their answers. Here again, the habits of work serve lawyers poorly as witnesses. Lawyers are paid to be knowledgeable. They rarely express doubts. . . . Tell him that he should answer only if, after careful evaluation, he is *sure* he knows the answer.

....

Your client may be emotional. For him, the world has been turned upside down. He is used to suing people, not being sued. He is used to giving advice, not taking it.

Jeffrey M. Smith, *Defending Lawyers' Mistakes*, LITIG., Winter 1989, at 18, 20, 56.

⁹³ See, e.g., Ramos, *supra* note 9, at 1661 n.23 (citing studies showing that lawyers lose before juries 93% and 67% of the time); see also Goerdts, *supra* note 20, at 24 (finding doctors lose only 30% of the time in jury medical malpractice trials).

⁹⁴ See Gordon, *supra* note 73, at 2110.

We can advise the student about to become a law firm associate that, if a partner tells her to destroy a document, she should go up the hierarchy and consult the respected senior partner. But suppose the senior partner backs up the junior? The associate can refuse of course, at the risk of being fired, or quit. But what signal will these actions

other.⁹⁵ Those, like me, who did inform and tried to get rid of unethical associates became suspect. I became someone who was not a team player, someone who, irony of ironies, could not be trusted to maintain the increasingly malignant firm culture.

The legal profession and lawyers were beyond rehabilitation.⁹⁶ It had changed me. I did not like what I saw. I also did not enjoy being sued.

How many times was I sued? I was sued three times by opposing counsel for "fraud" arising out of pending litigation. Those were scars of battle that I could arguably wear proudly. The three cases were quickly and routinely dismissed as a result of the litigation privilege.⁹⁷ The only time a client sued me was for failing to supervise an associate whom I no longer supervised, so that case, too, was quickly dismissed. My four legal malpractice lawsuits during fifteen years of practice was typical. My annual exposure claims rate was twenty-five percent, or one lawsuit every four years, and although all were dismissed, even lawyers do not like getting sued.

send to the other associates? Why, that sticking to your principles is naive and will do you in. This problem is not one that their law schools . . . can solve. When the bench and bar look to the law schools to solve problems by teaching virtue that practitioners could realistically only address by taking collective action themselves to toughen ethical standards, restructuring organizations like law firms, and imposing meaningful sanctions, it is a sign that their interest in reform is mostly symbolic.

Id.

⁹⁵ See MCKAY REPORT, *supra* note 15, at 125 ("Reporting by lawyers and judges of misconduct is still rare, and, in many instances, is motivated more by a desire to disqualify opposing counsel or gain advantage in a legal matter.").

⁹⁶ See Amiram Elwork, et al., *Lawyers in Distress*, J. PSYCHIATRY & LAW 205, 211-12 (1996) (citing several reasons as to why lawyers "burn out"). The main reasons for burnout are: (1) the adversary legal system itself, which makes one suspicious, hostile, aggressive, and cynical; (2) role conflict and ambiguity that exists when a lawyer is not sure whether he or she is an officer of the court, an advocate, a counselor, someone who has to hurt or help people, and whether one's job is ridiculed or prestigious; and (3) the legal environment's emphasis on detail-oriented rational analysis where mistakes can be costly.

Id.

⁹⁷ In California, as in most states, you or your client can lie and not be sued, so long as it arises from litigation. See CAL. CIVIL CODE § 47(b) (West Supp. 1996); see also *Rubin v. Green*, 847 P.2d 1044, 1047, 1054 (Cal. 1993). The California Supreme Court held that improper solicitation by an attorney was protected by the litigation privilege and noted that "[f]or well over a century, communications with 'some relation' to judicial proceedings have been absolutely immune from tort liability The only exception being for malicious prosecution actions." *Id.*

The time had come to close the door behind me, walk away and fulfill my dream of becoming a professor and scholar. Surely it had to be better than practicing law.

V. THE PROFESSOR: LAW SCHOOL MALPRACTICE

How could I have been so shocked and amazed that legal education in the last twenty years had changed so little? I had interviewed hundreds of young law students at the "best" law schools. I hired and trained scores of young associates whose abilities after graduating from law school and passing the bar exam were a little better than the paralegals who had gone to a six-week intensive paralegal studies program.

There were also hundreds of job interviews with law professors at scores of law schools. Law professors disdain lawyers and lawyers disdain law professors.⁹⁸ I had to apologize for practicing law for almost fifteen years. "Are you one of us?" "Are you one of those lawyers just looking for early retirement?" "Can you teach theory?" Law schools were clearly not at all interested in having lawyers teaching future lawyers. For instance, forty percent of law professors have never been in private practice, and only five percent of law professors have ever been partners in a law firm.⁹⁹ It was another new and alien culture.

A. *Fired Not Once, But Twice*

There were several thousand lawyers looking for tenure-track law professor jobs in 1992-93 but only 230 jobs were filled.¹⁰⁰ Out of almost 200

⁹⁸ See Edwards, *Disjunction*, *supra* note 43, at 35 (noting that the "reality [is] that many 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars, who are 'disdainful of the practice of law'").

⁹⁹ See ASS'N OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS 1995-1996 (1995) [hereinafter AALS DATA]. Also, a Westlaw Nov. 19, 1995 search found 10,613 listings of full and part-time law professors on the AALS database and only 588, or 5.5%, were former 'partners' who would have had significant private practice experience. See also Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 220-21 (1991). Using a small sample of 872 professors from the AALS 1988-1989 directory, the authors found "[o]ver one-half of those sampled (56.5%) worked in private practice at some point during their careers." *Id.*

¹⁰⁰ See Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates*, 44 J. LEGAL EDUC. 424, 425 (1994); see also Anthony Flint, *Class Action Pursuit: Weary of Grinds at Firms, More Lawyers Seek Teaching Jobs*, BOSTON GLOBE, Apr. 6, 1994, at Metro 1.

law schools, only two job offers materialized. Both of them were in Florida, a state familiar with Latinos, but with only two Latino law professors.¹⁰¹ St. Thomas in Miami was a law school that had yet to be fully accredited by the ABA. The other, Stetson Law School, in St. Petersburg, was Florida's oldest law school, and accredited by the ABA for almost a hundred years, but it ranked in the lower twenty-five percent¹⁰² and like St. Thomas I had never heard of it. Friends would ask, "Where in Texas is Stetson?"

Still, had it not been for the Yale degree, the Latino last name, a couple of "scholarly" publications¹⁰³ and a small ego, I probably would have also been rejected by St. Thomas and Stetson.

Neither school offered any credit for almost fifteen years of being a lawyer and a supervising partner in one of California's largest law firms, teaching scores of associates. It was only an assistant professorship. I was to make twenty-five percent of my lawyer income. I was treated no differently than someone who just graduated from law school. I pleaded with the dean for more money, an associate law professor title, and less time for tenure, but all to no avail. I ignored pleas from family and friends, accepted the position at Stetson, and moved from California to Florida.

If my Stetson Law School teaching experience was in any way representative, and I have no reason to doubt that it was, then legal education, like the legal profession, although they have little in common, is also in dire straits. Much of what is wrong with the legal profession is that there are lawyers, who pretend to but cannot, police other lawyers.¹⁰⁴ In legal education, much of the problem stems from a similar phenomena in that law professors pretend to but cannot police other law professors.¹⁰⁵

It was my first and last Stetson Law School faculty weekend retreat. The law professors were to begin the process of putting together a self-study for the once every seven years ABA accreditation evaluation. It seemed like the appropriate place for me to try and contribute to the discussion on what type of changes should be set in place at Stetson Law School for the new century.

¹⁰¹ These two professors were Professor Juan Perea at the University of Florida and Professor Al Garcia at St. Thomas. Professors Perea and Garcia were visiting professors at Boston College and American University Law Schools, respectively, for the 1995-1996 academic year.

¹⁰² See *A Long Shot, At Best*, U.S. NEWS & WORLD REP., Mar. 21, 1994, at 72, 74 [hereinafter *Law School Rankings*]. Stetson Law School was ranked 130 and 124 by academics and lawyer/judges, respectively. *Id.*

¹⁰³ See *supra* note 56, listing my published research and articles regarding the nation's drug problem.

¹⁰⁴ See MCKAY REPORT, *supra* note 15, at 125 ("Reporting . . . of misconduct is still rare"); Doherty, *supra* note 48, at 39.

¹⁰⁵ See Holmes, *supra* note 47, at A1, A17.

All but one of the faculty members had voted to support the official affirmative action policy of the university. It was then the politically correct thing to do. However, it was clear to me that their "heart" was not into the process. Scores of top minority candidates with Ivy League credentials never made it through the entire interview process. There was only one black and one Latino, me, on the Stetson law faculty, each the first in one hundred years, and both of us were untenured.

Still, ever the litigator/advocate, I voiced my concerns to my colleagues and said that from now on I could not, in good conscience, vote for any white-male faculty candidate until the faculty was more representative of Florida. There was complete silence. Then a senior faculty member shouted across a long table, "I am amazed that a colleague of mine could be such a racist."

I, naively, thought law professors were more like lawyers who enjoyed a good verbal joust. Then, too, there was something called "academic freedom" that would protect even the most radical of utterances. Was I ever wrong. These older, white-male tenured faculty members took this comment very personally. Months later, in the first ever secret balloting, the white-male tenured faculty voted to fire me and a woman, another outspoken lawyer and Yale alumna, hired at the same time.¹⁰⁶

¹⁰⁶ See Bruce Vielmetti, *Stetson Struggles to Diversify*, ST. PETERSBURG TIMES, June 20, 1994, at B4.

The school's one Hispanic professor, Manuel Ramos, found himself at the center of Stetson's—and 13-year Dean Bruce Jacob's—most defining conflict earlier this year.

....

Annoyed about some close votes against hiring minority job applicants, Ramos said he blurted out that he no longer could vote for any white male candidates.

....

When he came up for review in October, and again in January 1994, the tenured faculty voted to fire him, Ramos said. They cited his lack of publication, though he provided drafts of an article that was later accepted by the *Vanderbilt Law Review*.

....

I'm the first Latino in one hundred years," at Stetson, Ramos said. "Dorothea Beane, the first black. Since we're both the first, we're the ones to meet the resistance."

"It's been an uncomfortable time for both of us, but we're both optimistic."

He called the efforts to oust him "a political thing, a last gasp," by older faculty to stave off change.

Id.; see also Mark D. Killian, *Foundation Awards Grants for African-American Scholarships*, FLA. BAR NEWS, Apr. 15, 1996, at 10, 11 (noting that while African-Americans comprise 13.6% of Florida's population, Stetson Law School, with only 6%

The head of the Latino Law Professors Association was dumbfounded. "Manny, no one gets fired after only one semester!"¹⁰⁷ My wife offered little in the way of consolation. "Good. Let's move back to California and get your old job back." However, I was never one to back down and go out without a fight. Ever since I left Cuba and was told to attend a school for migrant workers because I could not speak English, or was informed that my high school standardized scores meant I should not go to college, I fought.

Stetson's then Dean, Bruce Jacob, who was on my side, worked out a compromise with the tenured faculty. Since I came midway through the academic year, we would not count that semester and I could start over, delaying the official vote of my contract renewal until the following semester. It placed me a year further away from tenure, but so what? At least I had a job.

The next contract renewal vote was taken a few months later. I got fired again by Stetson's tenured faculty. Dean Jacob and the President of Stetson University apologized, and this time just simply overrode the tenured law faculty.¹⁰⁸ Enraged, the law faculty tried to fire Dean Jacob even though he had already announced that after thirteen years he was stepping down. The ABA inspectors noted this outrageous episode and chastised the tenured faculty in the accreditation report.¹⁰⁹

African-American students, does not even come close to the other Florida law schools' percentage of African-American students: Florida (14%), Florida State (12%), Miami (13%), Nova (12%), and St. Thomas (11%).

¹⁰⁷ Telephone interview with Professor Michael Olivas, Associate Dean, Univ. of Houston Law School (Oct. 24, 1993) (notes on file with author).

¹⁰⁸ See Vielmetti, *supra* note 106, at B4.

[Dean] Jacob overrode his peers and renewed Ramos' contract.

Jacob said the override was his first in about 100 hiring and promotion decisions. He said it angered some colleagues who probably weren't even aware he had that authority.

"It was not a hard decision. It was so obvious to me," he said. "I think he's a damn good teacher and outstanding scholar. Stetson's a better place for having him."

Jacob is quick to point out that the vote against Ramos was close and by only the tenured faculty. Jacob said he thinks that, overall, Ramos enjoys faculty support.

Id.

¹⁰⁹ See Anne Lindberg, *Accreditation at Risk for Stetson*, ST. PETERSBURG TIMES, Apr. 27, 1995, at B6.

The ABA also is requiring the law school to set up a procedure for self-evaluation.

The following year, however, two other excellent but outspoken untenured law professors were also fired.¹¹⁰ The first professor was David Zlotnik, a Harvard Law School *cum laude* graduate and former federal prosecutor in Washington, D.C. Professor Zlotnik had the temerity at a faculty meeting to question a senior, white-male law professor's successful use of the "old [white] boy system," the old-fashioned "affirmative action." Despite three prior negative votes, the faculty eventually voted to hire a white male for a tenure track professor position after a promise that he would only be a temporary visiting professor. The second professor fired was Terry Pollman, an individual who turned down the head of the legal writing program at the University of Illinois Law School. Professor Pollman also supported a decanal review process that the new Dean opposed.

Professor Pollman also referred female students' accusations of sexual harassment by one of the senior male professors "in confidence" to the new

The ABA, which visits law schools every seven years to ensure they are worthy of maintaining accreditation, filed a report as part of that process. The report also cited other areas of concern, including a lack of diversity.

Id.

¹¹⁰ See Anne Lindberg, *Two Law Professors Lose Jobs at Stetson*, ST. PETERSBURG TIMES, Apr. 22, 1995, at E1.

Tenured faculty at Stetson University College of Law have decided not to renew the contracts of two professors.

That's just the latest volley in an ongoing struggle between the "old guard" faculty and brash newcomers who push for changes and more diversity, say some professors and students.

Not so, says Elizabeth Moody, the dean of Stetson. The decision was a matter of merit.

....

"This petition is a student effort to keep two dedicated and invaluable professors on the faculty of our school," the petition reads. Students began circulating the petition Thursday.

Stetson Professor Manny Ramos, a Latino who has his own troubles with the tenured faculty, said the decision not to renew the contracts for the 1996-97 school year was a political decision that sent a message saying the "old guard" does not want changes at the school.

....

The only power the senior faculty has, he said, is to get rid of professors who are ideologically and culturally different.

Id.

Dean. Upon discovering Professor Pollman's referral, that professor lobbied for votes against her. I think that the firings were purely political.¹¹¹ The vote was thirteen to twelve, but the new Dean, although a woman, ignored the unanimous recommendations by the faculty "mentor committees" set up in response to ABA criticism. She deferred to Stetson's old white-male tenured guard, the University President deferred to the new Dean, and the dismissals of two young excellent law professors stood.¹¹² Four out of five new law professors were fired. And I thought that law practice was bad!

For untenured faculty, clearly, there is no academic freedom.¹¹³ There is little opportunity to challenge the status quo. Senior tenured faculty members' fragile egos have to be massaged. For five or six years untenured young faculty stay quiet. They become part of an institutional culture that has changed little over the past several decades. Unfortunately, many young faculty change to fit in.

A year later I was promoted, albeit in a close vote, to associate professor. My year of service previously taken away was restored, and my contract was renewed. However, I left for the more liberal environment at Tulane, a much better law school, ranked in the top twenty-five percent.¹¹⁴ Still I was disappointed. In two years, Stetson, a potentially outstanding small law school,

¹¹¹ See *id.*; Lindberg, *supra* note 109, at B6.

¹¹² See Lindberg, *supra* note 109, at B6.

The [ABA] accreditation controversy is the latest in a series of troubles for the school, which erupted in controversy last week when the school's tenured faculty fired two professors by a 13-to-12 secret ballot.

Since then, more than 200, or about a third, of the school's students have signed petitions protesting the action and at least two professors have written letters of protest to university president H. Douglas Lee. . . . However, he declined to overrule the decision.

Id.

¹¹³ See *id.*

Mark Brown, a tenured faculty member who voted to retain Zlotnick and Pollman, said a small majority of the tenured faculty don't believe in diversity. Those faculty members think that hiring minorities or recruiting them as students is the same as taking a slot away from a deserving white person, Brown said.

"These people (who get fired) are different. They're liberal," Brown said. "They speak their minds, which is something you just can't do around here. . . . (Speaking your mind) gets you fired. So much for an open educational environment."

Id.

¹¹⁴ See *Law School Rankings*, *supra* note 102, at 73.

hired five new promising teachers and scholars. They were better teachers and scholars than the overwhelming majority of the senior tenured faculty. But now only one remains, too paranoid to speak up against the old guard. Luckily, three of the "Stetson Four" are still pursuing law teaching careers. Professor Pollman now heads the legal writing program at the University of Illinois Law School. The respective lawyers worked out a settlement for Professor Zlotnick, who is now teaching at Rhode Island's new and only law school, Roger Williams.

The ABA and the AALS (Association of American Law Schools) and the AAUP (American Association of University Professors) did nothing.¹¹⁵ Moreover, the two, white-male professors who were adverse to my presence at Stetson have since been promoted to administrative positions.

What were all the firings about? They were about politics, ego, and the inability of law professors to accept change. Despite my "racist" views, what also contributed to my firing was the unorthodox approach that I chose to take in teaching a first-year course. It was not taught in the traditional Socratic, theoretical, or case-method approach. Most of the casebooks in the area were almost identical to the casebooks I had studied twenty years ago. If they put me to sleep what would they do to students? Luckily, I was able to locate a casebook that used a more practice-oriented, "problem solving" approach. It was one of the few written by a woman.¹¹⁶ I also used legal malpractice cases throughout the one-year course to show how lawyers handling the same issues we studied in class found themselves as defendants in a lawsuit.

The students were engaged and enthusiastic, and gave me excellent reviews. However, the senior tenured professor in the subject area was aghast. He walked out during the middle of reviewing my class in order to make a not too subtle point. After one semester, students from that senior tenured

¹¹⁵ See, e.g., Letter from Carl C. Monk, Executive Director, Association of American Law Schools to Mark R. Brown, Stetson Law Professor at 1 (Feb. 12, 1996) (on file with author) ("The only mechanism for enforcement of AALS membership requirements is the regular law school site visit. The next site visit for Stetson is scheduled in academic year 2000-2001."); Letter from James P. White, Legal Education, ABA Section on Legal Education, to Mark R. Brown, Stetson Law Professor at 1 (Mar. 18, 1996) (on file with author) ("I am dismissing your complaint based upon my determination that your complaint and Dean Moody's response considered together do not support a claim that Stetson University School of Law is in non-compliance with the Standards for the Approval of Law Schools by the American Bar Association.").

¹¹⁶ See EDWARD H. RABIN & ROBERTA ROSENTHAL K WALL, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (3d ed. 1992). The book was published by Foundation Press, which along with West Publishing Company, its parent company, is one of the two main textbook publishers for law schools.

professor's course sought, and many received, refuge in my class. The students praised my teaching.

I did not teach to please senior tenured faculty members who were not highly regarded by students or even their colleagues. These professors teach required courses that students must take. Unsuspecting law students' complaints are ignored and forgotten.

I could not teach the ABA-required ethics course because it was being taught by a senior tenured professor. At least I was able to teach a new legal malpractice seminar at Stetson. The twenty students, the maximum who were able to get into the seminar, almost to a person, said that this was the best course they had ever taken.

B. Law Professors Can Not Regulate Law Professors

Legal education has become a form of legal malpractice in two ways. First, despite continued criticism, legal education does little to prepare someone for the practice of law.¹¹⁷ Second, by completely ignoring legal malpractice, either as a separate course or a subject worthy of mentioning in more traditional courses, law professors continue to squander a once in a lifetime opportunity to give their students the healthy dose of paranoia that is now required to practice law successfully.¹¹⁸

The ABA delegates the authority to administer law school accreditation to its Section on Legal Education and Admissions to the Bar, which, until a recent United States Department of Justice/ABA anti-trust consent decree consisted of

¹¹⁷ See Edwards, *Disjunction*, *supra* note 43, at 34; ABA SECTION ON LEGAL EDUCATION AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 386 (1992) [hereinafter MACCRATE REPORT]. After three years of public hearings and study, the report found:

There was also general agreement that law school graduates are not prepared to practice law without supervision. . . . There was less consensus, but certainly a fair amount of support for the proposition that law school graduates are not adequately prepared for their first jobs in law practice and that the gulf is widening as the practice of law becomes more complex and the range of skills more diverse.

Id.; see also Harry T. Edwards, *Another "Postscript," to the Growing Disjunction Between Legal Education and the Legal Profession*, 69 WASH. L. REV. 561, 568-72 (1994); Robert MacCrate, *Keynote Address—The 21st Century Lawyer: Is There a Gap to be Narrowed?*, 69 WASH. L. REV. 517, 520-24 (1994); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 615-24 (1994).

¹¹⁸ See *supra* notes 31-49 and accompanying text.

ninety percent law professors.¹¹⁹ Law schools with faculties mostly made up of practicing lawyers, such as the Massachusetts School of Law, with low tuition and a "practice oriented" curriculum were, not too surprisingly, denied accreditation.¹²⁰

¹¹⁹ See Holmes, *supra* note 47, at A1.

¹²⁰ See Mitchell Zuckoff, *From Iffy Start, A Law School Makes a Mark*, BOSTON GLOBE, July 2, 1995, at Metro 1.

[ABA] accreditation remains uncertain for the Massachusetts School of Law. Its long-term success depends on forcing or persuading the ABA to accept its unorthodox approach, which stresses practical skills like will-writing over legal theory. Students are accepted based more on life experience than on academic achievement, and standardized tests are dismissed by the dean [Lawrence R. Velvel] as "inaccurate, unfair."

....

Velvel... is also the consummate advocate for his school. He issues pronouncements such as, "Most law schools have nothing to do with teaching people how to practice law."

... "The ABA's big problem is that if this law school succeeds, a lot more like it will be springing up. We're the hole in the dike, and the ocean would come rushing through." Velvel says widespread acceptance of his school's methods would end the high price hegemony of major law schools, diminishing their power and mystique and lowering faculty salaries.

He brims with pride in the school's working-class students, whose average age is 33.

....

"Tuition is \$9,000 a year, or about 60% of the median among New England law schools."

Id. But see Dana Coleman, *ABA Pact Could Open Doors to New Law Schools*, N.J. LAWYER, Aug. 21, 1995, at 3, *quoting* Roger I. Abrams, Dean of Rutgers University Law School-Newark after the ABA/United States Department of Justice antitrust consent decree.

I see the people who see this as a business opportunity, like opening up a new Wal-Mart or K-Mart, they'll open up a new law school. I guess that's what we should expect. The legal profession has become a business and legal education [will] become a business.

For-profit law schools are now opening, he noted, in Jacksonville, Fla., Georgia, Rhode Island and California, the state that already has the largest number of non-ABA approved law schools.

Id.

ABA law schools had to pay law professors well;¹²¹ they do not force law professors to teach more than two courses a semester; they have large and

¹²¹ See Society of American Law Teachers (SALT), 1994-95 SALT SALARY SURVEY, 1-7 (June 1995) [hereinafter SALT SALARY SURVEY]. Although 65 ABA law schools did not respond, the median salaries and percentage of fringe benefits for assistant, associate, and full professors were published for 111 ABA law schools.

TABLE 6. LAW PROFESSORS' COMPENSATION AT ABA LAW SCHOOLS

The "top ten" law schools were:

School	Asst. Prof.	Assoc. Prof.	Full Prof.	Fringe Benefits
Michigan	\$78,500	N/A	\$130,750	23.1%
Cardozo	\$80,000	\$85,500	\$123,250	25%
Texas	\$81,750	N/A	\$123,000	27%
St. Johns	\$85,500	\$94,500	\$118,500	23.5%
Villanova	\$75,000	\$82,800	\$114,433	22%
Brooklyn	\$82,200	\$85,200	\$113,500	35.4%
Miami	N/A	\$81,761	\$111,560	27.5%
Tulane	N/A	\$79,350	\$111,200	24%
Seton Hall	\$67,538	\$77,256	\$110,897	28%
Connecticut	N/A	\$77,750	\$110,154	varies

The "bottom ten" law schools were:

School	Asst. Prof.	Assoc. Prof.	Full Prof.	Fringe Benefits
Mississippi College	\$54,000	\$56,000	\$77,000	varies
Oklahoma City	\$60,000	\$64,357	\$76,862	14.3%
Franklin Pierce	N/A	N/A	\$76,781	22%
New Mexico	\$64,100	\$58,000	\$76,256	19.4%
Wyoming	\$53,196	N/A	\$75,366	18.9%
Campbell	N/A	\$60,000	\$72,254	20.9%
Arkansas-Little Rock	\$53,000	\$60,756	\$67,000	22%
Akron	\$47,903	\$58,548	\$66,266	17% + \$5800 for health insurance
South Dakota	\$42,287	\$50,922	\$63,990	23.5%

expensive libraries. They also have low student/faculty ratios, have guaranteed sabbaticals and faculty leave policies, and provide other factors that, as alleged in the United States Department of Justice antitrust complaint, have, at times, been applied inappropriately "to [inflate] salaries for faculty members and others" ¹²²

It is little wonder that there is so much uniformity among the 179 ABA-accredited law schools. The faculty, like the legal profession, is still overwhelmingly white and male ¹²³ and without any significant lawyering experience. ¹²⁴

Montana	\$38,759	\$47,104	\$56,680	16% + \$2760 for health insurance
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Conspicuously missing from the salary survey were the following, mostly private law schools: Harvard, Yale, Stanford, Chicago, Duke, Virginia, Columbia, Cornell, USC, Northwestern, Vanderbilt, Georgetown, George Washington, NYU, and Washington & Lee, all of which would probably replace the existing "top ten" list. In addition, law professors usually are entitled to summer teaching or summer writing grants that are anywhere between 10% and 30% of their base salaries. Cf. Edward A. Adams, *Local Law Professors Highest Paid in Nation: NYU, Columbia Leaders in ABA Statistics*, N.Y. L.J., Jan. 29, 1996, at 1. As a result of the Massachusetts School of Law's antitrust case against the ABA, confidential median law faculty base annual salaries for all the ABA law schools surfaced. The "top ten" were: NYU (\$130,000); Harvard and Columbia (\$128,000); Virginia (\$119,000); USC, Texas and Duke (\$117,000); Fordham (\$115,000); Cardozo (\$114,000); and Villanova and St. John's tied for the 10th slot (\$113,000).

The [nine month] salary figures are just a portion of a professor's total compensation They do not include research stipends or pay for working during the summer, nor do they include fringe benefits like retirement funds, health insurance, housing allowances or tuition paid for a professor's children[] . . . [or income from] law firms [or clients] that employ the teachers.

Id. Compare William H. Honan, *Male Professors Keep 30% Lead in Pay Over Women, Study Says*, N.Y. TIMES, Apr. 11, 1996, at B9. According to the American Association of University Professor's study of four-year and two-year colleges and universities, "[t]he average salary for all professors, from lecturer to full professors was \$50,980." *Id.*

¹²² See Holmes, *supra* note 47, at A17; see also Wallace D. Loh, *Academic Perestroika*, AALS NEWSLETTER, Mar. 1996, at 3 (noting that the Association of American Law Schools President Loh concedes that legal education has "become big business").

¹²³ See ZITRIN & LANGFORD, *supra* note 41, at 626 ("In 1993, women made up 22% of all licensed lawyers; 3.35% of lawyers were African-American, and 3% were Latino. In 1994, of the 6,500 full-time tenure-track law professors in the nation, . . . 107 were Latino (1.7%), African-American professors made up 6.9%, Asian and Pacific Islander, 1.4%.");

According to the ABA, there are actually nine accredited law schools without any minority law professors, thirty-four with just one, and twenty-eight with just two. Among these seventy-one law schools are such "top" schools as Duke (1), University of Chicago (1), Washington & Lee (1), Emory (1), University of Arizona (1), Wake Forest (2), Vanderbilt (2), USC (2), and Wisconsin (2).¹²⁵ Two-thirds, or seventeen of the "top twenty-five" law schools, do not even have one Latino or Latina law professor.¹²⁶ Moreover, for every two minority law professors hired, one resigns.¹²⁷

Forty percent of the nation's law professors in ABA law schools have no private practice experience.¹²⁸ The mean is only 2.5 years of private practice experience.¹²⁹ Only five percent have ever been partners.¹³⁰ How can anyone expect law schools to teach students to become lawyers in the ever-tightening

Talbot Sandy D'Alemberte, *Racial Injustice and American Justice*, A.B.A. J., 58, 59 (Aug. 1992) (noting that only 1.7% of lawyers in the 250 largest law firms are African-Americans; only 49 of the 250 firms had more than one minority partner); see also Robert A. Rosenblatt, *Latinos, Asians to Lead Rise in U.S. Population*, L.A. TIMES, Mar. 14, 1996, at A1 (finding the nation's 26.4% minority population today includes: African-Americans (12%), Latinos (10.2%), Asians (3.3%), and American Indians (0.7%), and by the year 2050 the 42.7% minorities will consist of Latinos (24.5%), African-Americans (13.6%), Asians (8.2%), and American Indians (0.9%)).

¹²⁴ See AALS DATA, *supra* note 99 (39.1% in 1996); Borthwick & Schau, *supra* note 99, at 220 (44% in 1988).

¹²⁵ ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 4-63 (Rick L. Morgan ed. 1995) [hereinafter ABA EDUCATION].

¹²⁶ See MICHAEL A. OLIVAS, LATINO LAW PROFESSORS 1995-1996 (Fall 1995) (unpublished directory) (on file with author). The top-ranked law schools without a Latino or Latina law professor are Yale, Harvard, University of Chicago, Columbia, New York University, University of Pennsylvania, University of Virginia, Duke, Cornell, Northwestern, University of Southern California, Vanderbilt, University of Illinois, Washington & Lee, University of Minnesota, Emory, and Washington University. *Id.* See also *America's Best Graduate Schools, Law Schools*, U.S. NEWS & WORLD REP., Mar. 18, 1996, at 82.

¹²⁷ See Richard A. White, *Variations in the Success Rates of Minority and Nonminority Candidates*, AALS NEWSLETTER, Mar. 1996, at 6. In 1992, 21 left and 48 were hired; in 1993, 26 left and 45 were hired; in 1994, 22 left and 46 were hired; and in 1995, 31 left and 62 were hired. *Id.*

¹²⁸ See Borthwick & Schau, *supra* note 99, at 220. Using a small sample of 872 professors from the 1988-89 AALS directory, it was found that 56.5% were once in private practice. *Id.* But see AALS DATA, *supra* note 99 (showing only 60% indicating private practice experience seven years later).

¹²⁹ See Borthwick & Schau, *supra* note 99, at 221.

¹³⁰ See AALS DATA, *supra* note 99.

job market where young lawyers must be ready to hit the ground running? Experienced lawyers can quickly pick up theory, but law professors cannot pick up valuable lawyer experience.

Approximately one-third of all law professors graduated from just five of the "top" law schools, while sixty percent of law professors went to the "top" twenty "producer" law schools.¹³¹ Eighty-five percent of law professors teaching at the "top" seven schools received their J.D. degree from one of the same seven schools.¹³²

Such law faculty homogeneity comes at a high price. Law professors, as gatekeepers of the legal profession, are not doing enough to diversify themselves, the still predominantly white-male legal profession.¹³³ Moreover, students and future lawyers are saddled with college and law school loan debts of up to \$120,000,¹³⁴ but they continue to feed the insatiable appetite of the ABA tuition-driven law schools and the federally-subsidized law professors.¹³⁵

¹³¹ See Borthwick & Schau, *supra* note 99, at 226-27 (Harvard (13%); Yale (8.3%); Columbia (4.6%); Chicago (3.6%); Michigan (3.2%); NYU (2.6%); Virginia (2.5%); Berkeley (2.2%); Georgetown (2.2%); Wisconsin (2.2%); Texas (2.1%); Pennsylvania (1.9%); Stanford (1.6%); Tulane (1.6%); Boston College (1.3%); Cornell (1.1%); Illinois (1.1%); Mississippi (1.1%); Ohio State (1.1%); Duke (1.0%); UCLA (1.0%); George Washington (.9%); Hastings (.9%); Iowa (.9%); and Northwestern (.9%)).

¹³² *Id.*

¹³³ See ZITRIN & LANGFORD, *supra* note 41, at 626; D'Alemberte, *supra* note 123, at 59; Ann Davis, *Big Jump in Minority Associates, But . . .*, NAT'L L.J., Apr. 29, 1996, at 1 ("[T]he percentage of white partners at NLJ [largest] 250 firms dropped only from 97.6 percent to 97 percent during the past five years."); Chris Klein, *Women's Progress Slows at Top Firms*, NAT'L L.J., May 6, 1996, at 1 ("[At the NLJ largest 250 firms,] 13.6 percent of all partners are now women. . . . [T]he total number of women associates has [at the NLJ largest 250 firms] decreased 6.3 percent since 1991[:]. . . 13.6 percent of all partners are now women.").

¹³⁴ See Ann Davis, *Law Grads Face Pinched Futures: Heaviest Debt Burdens the Lawyers Least Able to Pay*, NAT'L L.J., Jan. 15, 1996, at A6.

Newly released data compiled by the Law School Admission Council confirms . . . [that] the heaviest debt burdens the lawyers least able to pay.

. . . .

. . . In the 18 least selective schools, nearly half the students borrowed 75 to 100 percent of their tuition and costs.

. . . .

. . . Average indebtedness among law graduates is now rising at a rate of more than 20 percent a year. About \$1.5 billion in borrowed cash financed the education of 70 percent of all students at ABA-accredited schools in 1994-'95.

There is no financial incentive for law schools to change. Applications may be decreasing,¹³⁶ but even the lowest ranked ABA-approved law school has little difficulty in filling classrooms with tuition rates of \$20,000 a year.¹³⁷ The *National Law Journal* recently profiled a front page story, *Lawyers Are Top Earners*, and bragged that according to the U.S. Labor Department's economic census data, lawyers' revenue increased fifty percent between 1987 and 1992.¹³⁸ It notes: "When revenue per employee is calculated, legal services top the list of twelve service industries, averaging \$109,476 in money brought in for every secretary, paralegal and lawyer listed on law firm payrolls."¹³⁹ Students complain and are unaware that the median income of most lawyers is less than \$40,000. Nevertheless, students will continue to apply, attend and graduate from law schools, and gain admittance to a state bar at the rate of

Id.; see also Ann Davis, *Debtor Class*, NAT'L L.J., May 22, 1995, at A24 (noting some law graduates "[c]arrying \$90,000, even \$120,000, in loans"); Jonathan D. Glater, *Loansome Law Students: Why Payback is Tough*, WASH. POST, Aug. 21, 1995, at F7 ("[L]awyers default at twice the rate of physicians.").

¹³⁵ See Loh, *supra* note 122, at 3. Loh, the President of the Association of American Law Schools, notes:

Any significant tuition increase encounters political resistance and demands inelasticity. Federally guaranteed and subsidized loan programs that finance two-thirds of the tuition at ABA-approved schools face sharp reductions. There are more law schools, producing more graduates, saddled with more crushing debt, and entering a more saturated job market, than any previous time in legal education. The pattern is just not sustainable.

Id.

¹³⁶ See Ken Myers, *The Four-Year Trend Continues: Number of Applicants Down*, NAT'L L.J., Oct. 23, 1995, at A20.

[I]n 1990-91, during the peak of what legal educators call the "L.A. Law" years for the popular TV show that many say glamorized the legal profession, there were 94,000 applicants for approximately 44,000 spots in the 178 American Bar Association-approved law schools. . . . [For] the 1994-1995 entering class about 78,800 people applied, a decrease of 16 percent over the four-year span.

Id.

¹³⁷ See ABA EDUCATION, *supra* note 125.

¹³⁸ Marianne Lavelle, *Lawyers Are Top Earners*, NAT'L L.J., Aug. 28, 1995, at A1.

¹³⁹ *Id.* at A22.

nearly 50,000 a year.¹⁴⁰ Law school tuitions and lawyers' school debts will also continue to increase.

Law professors disdain lawyers¹⁴¹ whose pure pursuit of profit makes a mockery of any ethical or competence standards.¹⁴² However, most law professors continue to send ill-prepared lawyers into the profession,¹⁴³ limit

¹⁴⁰ See Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345, 394 tbl.7 (1994) (noting that between 1976 and 1990 the median income for solo practitioners only went from \$15,830 to \$35,730); see also ABA EDUCATION, *supra* note 125, at 67 (noting that during the 1994-1995 academic year, the first year enrollment was 44,298; total J.D. enrollment was 128,989; 39,710 J.D. degrees were awarded and 49,135 were admitted to a state bar); CURRAN & CARSON, *supra* note 12, at 25 ("In 1991 45% of lawyers in private practice were sole practitioners.").

¹⁴¹ See Edwards, *Disjunction*, *supra* note 43, at 35 ("[The] reality [is] that many 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars, who are 'disdainful of the practice of law.'").

¹⁴² See *id.* at 67-68.

Almost every respondent to my survey deplored the ethical failings of the practicing bar. There was a general consensus that practicing lawyers are overly concerned with profit . . . [M]any, many law firms have transformed themselves into "money machines," where partners and associates finance their huge salaries in luxurious surroundings by billing a tremendous number of hours.

Id.; see also ABEL, *supra* note 15, at 182-202; MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 37-76 (1991).

¹⁴³ See MACCRATE REPORT, *supra* note 117, at 386. But see John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 189 (1993). The then-dean of Vanderbilt Law School argues that unlike the well funded medical schools, law schools do not have the financial resources to train lawyers to actually practice law: "[T]he American law school produces graduates who require post-law school seasoning to mature their competence as lawyers." *Id.*; Wade Lambert et al., *Suit Says ABA Accreditation Is Out of Date*, WALL ST. J., Nov. 24, 1993, at B1. After it was denied accreditation, the Massachusetts School of Law, which has practicing lawyers teach students, is now suing the ABA, claiming the ABA requirements

result in law school tuitions that are 40% to 50% higher than they otherwise would be[.]

Dean Velvel [of the Massachusetts School of Law also] says the [ABA] standards are biased in favor of programs that teach legal theory at the expense of such practical skills as drafting contracts or negotiating agreements.

those lawyers' options to do public service jobs that pay little more than the \$1,000 to \$2,000 a month student loan debt obligations,¹⁴⁴ and allow their law schools to serve as incubators for legal malpractice.¹⁴⁵

A lawyer's relentless pursuit of profit is increasingly, in part, a result of legal education's indifference to escalating tuition costs, and its inability to change tired, decades-old courses and professors. Young lawyers join the overgrowing ranks of solo practitioners¹⁴⁶ who already make up over half of

[Moreover, she says,] "People in most law schools today are being taught by people who don't know the life these students will have and don't have the skills the students will need[.]"

Id.

¹⁴⁴ See Edwards, *Disjunction*, *supra* note 43, at 71.

[M]any graduating law students are not greedy materialists, fully prepared to engage in unethical practice. Rather . . . there is a significant percentage of "ethical graduates," who find it difficult or impossible to realize their ethical ideals in private practice.

Judge Edwards further noted:

Indeed, many of these graduates feel constrained by student debt to enter private practice in the first place. "We all can talk in lofty idealistic language about the need for quality legal services to low income folks, and how law schools should do more to encourage their students to forego the big bucks. But until something is done to accommodate the monthly debt of those who go into public interest law, no real change will happen.

I am a typical case in point. As you know, I had to move back in with my parents (at age 30, with my [spouse] and [child]) in order to leave the private sector and take a government job

The problem is that my student loan debt (most of it from law school) totals over \$35,000; or, translated, means I pay \$500 per month. This is roughly equivalent to rent for a two-bedroom apartment in a nice suburb in this city. (quoting Government Lawyer #3).

Id. at 71 n.103.

¹⁴⁵ See *supra* notes 100–16 and accompanying text.

¹⁴⁶ See Kathleen Brady, *Law School Faculties: Gatekeepers to the Profession*, SYLLABUS, Fall 1995, at 8, 9. Brady, president of the National Association for Law Placement notes that "69.6% of the 31,754 1994 law graduates reported full-time legal positions, 55% entered private practice; 48% in private practice entered firms of 2–25 lawyers, and only 11% of those in private practice found jobs in the firms with over 250

the lawyers in private practice.¹⁴⁷ They are increasingly incompetent,¹⁴⁸ and, unfortunately for their clients, uninsured, and still adept at hiding their assets.¹⁴⁹ Graduating law students cannot find work.¹⁵⁰ Lawyers who are laid off in a tough job market also go at it alone.

This bleak picture for lawyers contrasts sharply with those who are able to secure tenured faculty positions at one of the 179 ABA law schools. After five or six years of teaching the same courses and writing two or three law review articles that few will ever read, tenure is conferred. The median income for

lawyers. Small firms of 2-25 attorneys continue to be the single most important source of employment for new graduates." *Id.* But see ABA EDUCATION, *supra* note 125, at 67 (showing that in 1994, 40,213 (not 31,754) students graduated from ABA law schools and 49,135 students were admitted to a state bar). That we can only account for 22,100 or 45% of 1994 law graduates with full-time legal positions suggests many more new, ill-prepared solo practitioners are trying to make a marginal living.

¹⁴⁷ See ABA EDUCATION, *supra* note 125, at 67; see also CURRAN & CARSON, *supra* note 12, at 25. "Solos," according to data supplied by the MARTINDALE-HUBBELL DIRECTORY, make up 45% of private practitioners. *Id.* But see Ramos, *supra* note 52 (showing that 16% of Florida lawyers were missing from the MARTINDALE-HUBBELL DIRECTORY and LEXIS Database and that most of the missing lawyers were probably solo practitioners). Thus, the 45% given for solo practitioners should probably be higher, perhaps closer to 60%. See also Telephone Interview with Gail Castro, editorial assistant, Martindale-Hubbell Directory (May 3, 1996) (on file with author). Although the names and addresses of all newly admitted lawyers are used, if the new lawyer does not return the Martindale-Hubbell questionnaire, then she is never listed. Similarly, if lawyers do not return the follow-up questionnaire that is sent every two years or it is returned without a forwarding address, then those lawyers are not listed in the Martindale-Hubbell Directory. *Id.* Thus, particularly in transient states like Florida and California, there may be up to 20% more lawyers, mostly solo practitioners, who are unaccounted for by Martindale-Hubbell and by CURRAN & CARSON.

¹⁴⁸ See MACCRATE REPORT, *supra* note 117, at 386.

¹⁴⁹ See CAL. STATE INS. DATA, *supra* note 26 (finding 55% of private practitioners in California are uninsured); OSTBERG, *supra* note 14, at 41 (finding 40% of lawyers nationwide are not insured); Calve, *supra* note 4, at 1 (noting that in Texas, 50% of lawyers and up to 90% of solo and small firm practitioners are not insured); see also Jon Newberry, *Protect Assets Before Lawsuit Arises: Financial Planning Can Help Preserve Profits, Dissuade Claimants*, 82 A.B.A. J., 89 (Jan. 1996). The ABA gives its readers ethically questionable advice: "[A] successful lawyer probably ought to consider an offshore trust [e.g., the Cook Islands in the South Pacific]. . . . By removing that wealth as an easy target, asset protection planning can dissuade claimants." *Id.* But see Roberta Cooper Ramo, *Let's Not Take It Anymore: Speaking Out Against Spurious Attacks on the Legal System is Vital*, 82 A.B.A. J., 6 (Mar. 1996). Ramo, President of the ABA, still tries to defend the legal profession's tarnished image: "If the public does not understand, it cannot value the system or the lawyers who serve the public and make the system work." *Id.*

¹⁵⁰ See Brady, *supra* note 146, at 8-9.

tenured law professors¹⁵¹ is well above that of lawyers in private practice.¹⁵² Some law professors, such as Geoffrey Hazard, formerly at Yale, and now at the University of Pennsylvania, in addition to a six-figure law professor salary, makes \$375,000 a year by consulting and serving as an expert witness in hundreds of legal malpractice cases.¹⁵³

There is not much hope for any fundamental changes in legal education. Few professions are as homogeneous as law professors.¹⁵⁴ Students and scholarship increasingly take a back seat to the academics' political turf wars that occur over hiring, promotion, compensation, granting tenure, choosing deans, and admitting new students. Try as a newcomer to legal education to change the status quo, and you, as the critic/messenger will be in jeopardy.¹⁵⁵

¹⁵¹ See SALT SALARY SURVEY, *supra* note 121, at 1-7; see also Adams, *supra* note 121, at 1; Flint, *supra* note 100, at 1 ("An associate at an established Boston firm can make \$90,000 a year and up, and a partner \$150,000 and more. But many law . . . professors can, with perks, make upwards of \$200,000 And most law professors have summers off.").

¹⁵² See, e.g., Nelson, *supra* note 140, at 395 tbl.7 (noting that in 1990, the median income for solo practitioners was only \$35,730 while the median income for partners in law firms was \$123,756); CURRAN & CARSON, *supra* note 12, at 25 (finding almost half, or 45% of lawyers in private practice were solo practitioners); see also THE FLORIDA BAR DATA REFERENCE HANDBOOK, June 1993, at 46. A statistical profile of a Florida lawyer shows that he is more likely to be male (80%), 43 years old (mean), white (93%) with an income of \$70,000 (median) or \$50,000 (mode) annually. *Id.*

¹⁵³ See Tim Bryant, *Colleagues Court Disdain in Legal Malpractice Cases*, ST. LOUIS POST-DISPATCH, Mar. 5, 1995, at C5 ("In April, *The American Lawyer*, a magazine based in New York, estimated in a cover story that Hazard, then teaching at Yale, earned at least \$375,000 a year from his consulting practice. Hazard, 65, doesn't dispute the figure. He says he charges \$500 an hour for his advice.").

¹⁵⁴ See Borthwick & Schau, *supra* note 99, at 236-38; see also Lani Guinier, et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 2 n.2 (July 1993) (citing a memorandum from Robert A. Gorman, Associate Dean, University of Pennsylvania Law School: "What is striking about American legal education is not the differences but the sameness.").

¹⁵⁵ See Edwards, *Disjunction*, *supra* note 43, at 77.

[T]he professor without tenure may not be so free. At a law school dominated by "impractical" scholars, a junior professor might risk his or her career by eschewing high theory. Similarly, at a law firm where "billable hours" is the main criterion for partnership decisions, associates may find it difficult to work pro bono or even to keep an ethical distance from their clients.

Id.

Unfortunately, ABA law schools will not change from within. Professors at the "top" law schools will continue to write casebooks that are out of step and have little practical relevance to the practice of law.¹⁵⁶ Law professors will continue to teach the way they were taught, to hire those more like themselves, and to ignore the criticism from the practicing bar and those experienced lawyers who would like to teach.

Tenure will not be abolished anytime soon. Tenured professors who are bad teachers will continue to teach the mandatory, mostly first-year courses they have taught for decades. Tenured professors who have not written never will.¹⁵⁷ Tenured professors will continue to enjoy median salaries well above those of practicing lawyers,¹⁵⁸ but will work less and never have to worry about burnout or legal malpractice lawsuits.¹⁵⁹

Perhaps there does exist a small glimmer of hope for legal education. It will not come from tinkering with the existing curriculum or hiring lawyers as underpaid (or not paid) adjunct professors who, if they became paid, full-time professors, could better teach students to be lawyers. The reform has to be

¹⁵⁶ As a former lawyer interested in teaching law students to be lawyers, I continue to have problems selecting materials and casebooks for my courses. For my Legal Profession course, I chose: ZITRIN & LANGFORD, *supra* note 41. The authors, both practicing San Francisco Bay Area lawyers who are also adjunct professors at the University of San Francisco and the University of California at Berkeley (Boalt) law schools, respectively, use a problem-solving format. In addition to teaching legal malpractice in the Legal Profession course, I have selected THE FLORIDA BAR CONTINUING LEGAL EDUCATION, PROFESSIONAL LIABILITY OF LAWYERS IN FLORIDA (1993), written by practicing Florida lawyers. For my insurance course, I am also using a problem-solving approach. I selected a three-volume paperback text written for practicing California lawyers by lawyers and judges, JUSTICE H. WALTER CROSKY ET AL., INSURANCE LITIGATION (1995), along with numerous hypotheticals provided by the publisher, the Rutter Group, a division of West Publishing Company.

¹⁵⁷ Even in the "top" law schools, once professors are given tenure, many stop writing. See James Leonard, *Seen' the Cites: A Guided Tour of Citation Patterns in Recent American Law Review Articles*, 34 ST. LOUIS U. L.J. 181, 216 (1990) ("So long as we recognize citation frequency as being synonymous with scholarly value, it appears that influential scholarship is the preserve of a handful of law reviews and is generated by a small body of scholars distinguished by legal education and faculty position.").

¹⁵⁸ See SALT SALARY SURVEY, *supra* note 121; see also Adams, *supra* note 121, at 1; Nelson, *supra* note 140, at 394 tbl.7.

¹⁵⁹ Cf. Brian S. Gould, *Beyond Burnout: You Can Withstand the Heat of Ambition*, BARRISTER, Summer, 1983, at 4, 6, 50-53 (noting that although law professors work as hard as practicing lawyers, they do not show the same symptoms of burnout.). However, thirteen years later, based on my own personal experience as a lawyer and a law professor, I can definitively state that law professors do not work as hard as lawyers.

more fundamental. Ironically, with the help of antitrust laws,¹⁶⁰ it will arise from outside the traditional ABA-accredited schools.¹⁶¹

For instance, the Massachusetts School of Law, recently denied ABA accreditation, appears to be a viable alternative model.¹⁶² The faculty is comprised mainly of lawyers who both practice and teach. The overhead and the tuition is low. The students learn not only how to "think like lawyers" but also to "practice like lawyers."¹⁶³ The significantly lower tuitions that these types of law schools can offer means that increasingly diverse law graduates will not be over-burdened with debt and forced to take the first or highest paying lawyer job and bill as many hours as humanly possible.

Competition from these private, practice-oriented law schools will hopefully lead to changes in curriculum and hiring policies at the ABA-

¹⁶⁰ See Holmes, *supra* note 47, at A1.

¹⁶¹ Former law professor and noted Circuit Court of Appeals Judge Posner believes that a lawyer should not even have to attend law school. See Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1927 (1993).

¹⁶² See Zuckoff, *supra* note 120, at 1.

[Dean] Velvel says many of the ABA standards are meaningless, designed less to ensure a sound legal education than to keep tuition high and guarantee rich salaries for law professors.

He has won general support from 14 prominent law school deans who last year signed a letter calling for changes to the [ABA] accreditation process. More specific support came from a committee of New England lawyers, including John E. Fenton, Jr., dean of the Suffolk University Law School. A report from the committee after a 1992 inspection concluded that the overall impressions of the school "were almost entirely positive."

Id. Compare *A Passing Interest*, MASS. LAW WKLY., Dec. 13, 1993, at 42 (finding the Massachusetts Law School's bar passage rate was 65% and favorably compared to the overall 77% Massachusetts bar passage rate for the July 1993 bar exam) with Ken Myers, *Low Grades from the ABA Spur Unique School for Traditional Path*, NAT'L L.J., May 6, 1996, at 12 (noting that the ABA-accredited City University of New York Law Schools' 1993 graduates' New York bar passage rate was 54% compared to 82% statewide).

¹⁶³ See Zuckoff, *supra* note 120, at 1.

"This school deserves to be recognized," said Charlene Stawicki, a special assistant U.S. attorney in Boston who graduated in 1992 and passed the bar exam on her first try. "Every professor knows the practice of law on a day-to-day basis, and they know how to turn students into lawyers."

Id.

accredited, traditional law schools. The Massachusetts School of Law's lawsuits against the ABA for \$90 million are still pending.¹⁶⁴ If the school prevails it could revolutionize legal education and in turn help reform the legal profession.

VI. THE SCHOLAR: WHERE IS THE AUDIENCE?

My first published article, twenty years ago, when I was a first-year law student, was a cover story for the *Washington Post Sunday Magazine*.¹⁶⁵ It had a circulation of over two million readers. My free-lance writing career continued through law school and almost led me to accept a staff writer position with San Diego's leading newspaper, the *San Diego Union*.

Once I began practicing law there was no time for writing. There was no time for even reading the daily newspaper, let alone any law review articles. During fifteen years of practicing law in California, I never read a law review article or knew of any lawyers who did. After all, they were written by law professors. What did *they* know about practicing law?

My first published law review article, a lead article in the *Vanderbilt Law Review*, one of the best in the country, still only had a circulation of less than 1,000.¹⁶⁶ Although law review articles are essentially ignored by the practicing bar and judiciary, law professors must write and publish at least two or three of them prior to the granting of tenure. The "higher" the prestige of the law school one publishes in, the more likely that the scholar is able to move or

¹⁶⁴ See Mitchell Zuckoff, *Law School Files \$90 Million Suit*, BOSTON GLOBE, Sept. 26, 1995, at 43.

The Massachusetts School of Law, long enmeshed in a battle over accreditation, filed a[nother] lawsuit yesterday seeking \$90 million in damages from several pillars of the American legal establishment.

The suit accuses the American Bar Association, top ABA officials and the Association of American Law Schools of committing fraud, destroying documents and taking other actions designed to destroy the Massachusetts School of Law.

Id.; see also Ken Myers, *In A New Lawsuit, MSL Alleges Accreditation Bid Was Targeted*, NAT'L L.J., Oct. 9, 1995, at A25.

¹⁶⁵ See Manuel R. Ramos, *Hippies' Fates: Sagas of the Seventies*, WASH. POST SUNDAY MAG., Jan. 4, 1976, at 14-27 (detailing follow-up profiles of drug users, most of whom had "naturally" gone "straight" without medical or police intervention).

¹⁶⁶ Telephone interview with Martha Wagner, VAND. L. REV., (Dec. 11, 1995) ("It's a little less than 1,000 and it's been dropping off now that everyone has computerized access with WESTLAW.").

"write up" the academic ladder to the better law schools,¹⁶⁷ better pay, better students, and ironically, more opportunities to write non-academic articles or books that reach a wider audience.

It is in my life as a scholar and author, generously supported in both time and money by law schools, where I, optimistically, hope to make the greatest inroads in changing the legal profession and legal education. Most law professors simply do not write.¹⁶⁸ Those who do write, write only for themselves or for a few others in the academy. Very few law professors take that next step and address the wider audience of practicing lawyers and even wider audience of the general population.¹⁶⁹

Those law professors who do continue to write, however, given their homogeneity and insularity, may just simply be ill-equipped to write and appeal to others except themselves. Few practicing lawyers will take any heed from a law professor's prose. An author who has not practiced law cannot relate to lawyers. A pure academic cannot relate to the general population. When it comes to CLE programs for lawyers, law professors are conspicuously absent.¹⁷⁰ Similarly, most of the CLE scholarship for lawyers is authored by leading lawyers and judges.¹⁷¹

¹⁶⁷ A veteran lawyer interviewing for a law professor position quickly learned that "scholarship, not teaching, is the be-all and end-all in academia." See J. Cunyon Gordon, *A Response from the Visitor from Another Planet*, 91 MICH. L. REV. 1953, 1959 (1993).

¹⁶⁸ See David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 993 (1991) ("It is well documented that many tenured faculty members simply do not engage in any scholarship after achieving tenure."); see also Edwards, *Disjunction*, *supra* note 43, at 51 n.50 ("Professors at the 'elite' law schools account for a disproportionate share of the articles in the influential law reviews."); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926, 926 (1990).

¹⁶⁹ It is difficult to think of any law professors who regularly write for publications targeting lawyers. However, University of Pennsylvania Professor Hazard has a regular column on "Ethics" in the *National Law Journal*. In addition, Harvard professor Alan M. Dershowitz's book about his former client, Klaus von Bülow, acquitted of murdering his wealthy wife, was even made into a Hollywood movie. See ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE: INSIDE THE VON BÜLOW CASE* (1986); *Reversal of Fortune* (Warner 1990). However, such examples are rare.

¹⁷⁰ See, e.g., the following advertisements by the Florida Bar Continuing Legal Education Committee: *Medicaid in Florida: The Basics and Beyond*; *Florida Partnership Law: The New World*; *The Law and Practicalities of Guardianship*; *Bankruptcy Law and Practice*; *New Family Court Rules: The Start of a New Era*; *What You Need to Know to Practice Family Law*; *The Growing Significance of Shrinking Values*; *21st Annual Public Employment Labor Relations Forum*; *White Collar Crime: Drawing the Line Between Business Practice and Criminal Conduct*; *Collection of Judgments for the General Practitioner*; and *Land Trust Seminar*, FLA. BAR NEWS, Oct. 1, 1995, at 33-39. These 103

A. Academics

Patiently, I continue to write for other law professors and to seek tenure and job security. In the process, however, there are some hopeful signs that my message on legal malpractice is reaching others.

For instance, Deborah Rhode, a Stanford law professor and the Director of Stanford's Keck Center on Legal Ethics and the Legal Profession, is a leading scholar in the legal ethics field. Although a Yale classmate and sympathetic to my views, she is still reluctant to accept that legal malpractice is the main way that lawyers are being regulated today. But she is coming close.¹⁷² At least she acknowledges my work in her two most recent books¹⁷³ and a law review article.¹⁷⁴

Prior to my legal malpractice articles, most scholars, like Rhode, could only rely on the misleading insurance industry-sponsored ABA Study of the early 1980s for statistics on the frequency and severity of legal malpractice.¹⁷⁵

CLE speakers collectively consisted of 96 lawyers, four judges, one appraiser, and two law professors.

¹⁷¹ See, e.g., Croskey, *supra* note 156. For instance, in this three volume California practice guide on insurance litigation, the text was authored by a former California Supreme Court Judge, Hon. Marcus M. Kaufman, now a practicing lawyer and partner in a leading California law firm and Hon. H. Walter Croskey, a sitting California Court of Appeals Judge and six leading practicing California lawyers in the field. See also FLORIDA BAR CONTINUING LEGAL EDUCATION, FLORIDA REAL PROPERTY LITIGATION (1993). Out of the 28 authors of this comprehensive continuing legal education practice guide, 27 were practicing lawyers and one was a law professor. *Id.*

¹⁷² See Goldberg, *supra* note 10, at 76.

The lax standards and enforcement structure that the profession has set for itself are being increasingly displaced by civil liability claims and by administrative agency oversight. Lawyers are unhappy about that, just as doctors are, but I think it's likely in the long run to produce some much needed changes in terms of the bar's responsiveness to complaints of overcharging and inadequate representation.

Id. (quoting Deborah Rhode).

¹⁷³ See RHODE, *supra* note 41, at 84 & 128 n.96; RHODE & LUBAN, *supra* note 41, at 886 nn.1 & 2, 887 n.6, 890 n.11, 894 n.21.

¹⁷⁴ See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 698 (1994).

¹⁷⁵ See, e.g., Wilkins, *supra* note 10, at 831 n.129; *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1558 n.1 (1994); see also RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* (1996)—This leading four-volume text by two insurance defense lawyers cites and ignores my work

For instance, in the 1992 edition of Rhode and Luban's *Legal Ethics* casebook, the authors had this to say about legal malpractice:

By 1980 . . . 85% of practicing attorneys had some form of [insurance] coverage. . . . Estimates from the mid-1980s suggested that 10% of the nation's lawyers were facing malpractice charges. . . . Yet despite the escalation of malpractice claims, the barriers to successful actions have remained considerable.

The burden of proof necessary to establish attorney liability is often difficult to meet. [ABA] [d]ata available in the mid-1980s indicated that over two-thirds of all malpractice claims result in no payment. Of those claims that are successful, 70% provide recoveries of under \$1,000, and most involve fairly obvious errors, such as missing deadlines, neglecting to file documents, or failing to consult clients and follow their instructions. In cases presenting less objective proof of error, clients will often have difficulty establishing what exactly the attorney did or didn't do, and how that conduct fell below average performance standards within the relevant legal community.¹⁷⁶

Certainly there is nothing here to get very excited about. Rhode and Luban's 1992 ethics casebook, like dozens of other ethics casebooks, unfortunately relies on the erroneous ABA Study and thus marginalizes and distorts the legal malpractice picture. In 1992, Rhode and Luban devoted only six out of 1,022 pages¹⁷⁷ to legal malpractice in a casebook used in the only law school course expected to address legal malpractice. These pages are dated and inaccurate; it is the type of "spin" that the ABA and the legal malpractice insurance carriers desire on legal malpractice.

When I researched the existing literature, both academic and lay, in preparation for my *Vanderbilt Law Review* article on legal malpractice, I was shocked and astounded at how little information existed. Even worse, the information available on legal malpractice was inevitably adopting what the insurance industry and the ABA espoused. That is, legal malpractice was nothing to get excited about. As long as you were not a solo practitioner who did personal injury work, you were safe.¹⁷⁸ Just get yourself a good

and still relies almost exclusively on the decade-old and questionable statistics of the ABA Study. See ABA STUDY, *supra* note 50.

¹⁷⁶ See DEBORAH RHODE & DAVID LUBAN, *LEGAL ETHICS* 956-57 (1992) (footnotes omitted).

¹⁷⁷ *Id.* at 956-61.

¹⁷⁸ See William H. Gates, *The Newest Data on Lawyers' Malpractice Claims*, 70 A.B.A. J. 78, 84 (Apr. 1984). The project chairperson of the ABA Study, William H. Gates, initially explained: "What information is available suggests that about 50% of lawyers practice in firms of five or less. Accordingly, with some 80% of claims being made against lawyers in this group it appears that their malpractice risks are greater." *Id.* But see

calendaring system and you could go through a career without a legal malpractice claim.

Law students, lawyers, legal scholars, and the consumer public were not receiving accurate information on legal malpractice. Contrast Rhode and Luban's description of legal malpractice, quoted above, with the abstract of my recent *Vanderbilt Law Review* article, *Legal Malpractice: The Profession's Dirty Little Secret*:

Every year over twenty percent of lawyers in private practice face legal malpractice exposure; almost ninety percent of the lawsuits secretly settle; the average settlement ranges from \$25,000 to \$5,688,888 depending on the type of claim; and lawyers lose before hostile juries ninety percent of the time. The frequency and seriousness of legal malpractice is much higher than previously imagined. After handling over 900 legal malpractice defense cases in Southern California for approximately twenty insurance companies, the Author presents his own study showing that eighty-eight percent of his cases settled and the average settlement was \$60,393. He critically evaluates the 1985 ABA study of 29,277 claims, the Florida Department of Insurance's mandatory reporting data on 4,704 claims, Oregon's mandatory legal malpractice insurance data on 5,928 claims, and the few statistics available from uncooperative insurance companies. Consumers have taken advantage of the lawyers' plummeting prestige. Legislators and judges have opened the gates to aggrieved clients and nonclients. Jurors increasingly decide against lawyer defendants on issues of credibility, liability, damages, and defenses. Self-regulation, moral fitness requirements, law school education, CLE programs, state disciplinary systems, and lawyer assistance programs for alcohol, drug and mentally impaired lawyers erroneously focus on "weeding out," educating, or rehabilitating the "bad" lawyers. The "few bad apples" approach is not working. Behavioral science suggests that the focus must shift to making fundamental changes to the malignant situations that breed much of today's legal malpractice. The legal malpractice "iceberg" will not thaw anytime soon. Meanwhile, a shift in

William H. Gates, *Lawyers' Malpractice: Some Recent Data About a Growing Problem*, 37 MERCER L. REV. 559, 566 (1986).

[A]n important limitation on the interpretation of this [ABA] study data must be mentioned. The data center has very little information about overall characteristics or activities of lawyers. . . . Accordingly, the data center cannot conclude with certainty that the number of claims associated with such [small/2-5 lawyer] firms in that field of law [25.3% of personal injuries/plaintiff] are disproportionate.

Id. Scholars miss the *Mercer Law Review* retraction and continue to cite the Gates ABA Journal version. See, e.g., GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 499-500 (1988); Wilkins, *supra* note 10, at 831 n.129.

mandatory legal malpractice insurance can make the profession more accountable and consumer friendly.¹⁷⁹

Thus, there are two completely divergent diagnoses of the legal malpractice "problem" in the legal profession. My view has generated at least a critical look at prior data supplied by the ABA and the insurance industry. These data, not too surprisingly, place a spin that is flattering to both the legal profession and discourages aggrieved clients, plaintiff's attorneys, and even anti-lawyer and consumer groups like HALT¹⁸⁰ from touting legal malpractice as a viable vehicle for reforming lawyers.

At least in their 1995 edition of *Legal Ethics*, Rhode and Luban now quote my work.¹⁸¹ Although they still only devote eight and one-half out of 932 pages to legal malpractice,¹⁸² they made some changes. They changed "85% of practicing attorneys had some form of [insurance] coverage" to 70%, which should probably be reduced even more to about 50%.¹⁸³ They deleted the 1992 portion that refers to the ABA Study: "[ABA] [d]ata available in the mid-1980s indicated that over two-thirds of all malpractice claims result in no payment. Of those claims that are successful, 70% provide recoveries of under \$1,000" ¹⁸⁴ That was replaced with the following more cautious language: "Although the data on malpractice success rates are incomplete and conflicting, a large percentage of cases result in little or no recovery."¹⁸⁵ The statement that "10% of the nation's lawyers were facing malpractice charges" remains the same in the 1995 edition,¹⁸⁶ but at least my article was cited in a footnote, and parenthetically the reader could see that I was "critically evaluating estimates of legal malpractice claims and suggesting that over 20% of lawyers in private practice face malpractice exposure each year."¹⁸⁷

The 1992 edition of *Legal Ethics* inferred that there was nothing extraordinary about the quick rise in legal malpractice claims, "nor was the legal profession unique. A rise in consumers' sense of entitlement helped account for increases in claims against other professionals as well; even clergy

¹⁷⁹ Ramos, *supra* note 9, at 1657.

¹⁸⁰ See OSTBERG, *supra* note 14. Even in HALT's 1995 edition the misleading legal malpractice ABA Study is quoted throughout.

¹⁸¹ See RHODE & LUBAN, *supra* note 41, at 886, 887, 890, & 894 nn.1, 2, 6, 11, 21.

¹⁸² *Id.* at 886-94.

¹⁸³ See, e.g., OSTBERG, *supra* note 14, at 41 (40% uninsured lawyers); Calve, *supra* note 4, at 1 (50% uninsured lawyers and up to 90% for solo practitioners).

¹⁸⁴ RHODE & LUBAN, *supra* note 176, at 956-57.

¹⁸⁵ RHODE & LUBAN, *supra* note 41, at 887.

¹⁸⁶ RHODE & LUBAN, *supra* note 176, at 956; RHODE & LUBAN, *supra* note 41, at 886.

¹⁸⁷ RHODE & LUBAN, *supra* note 41, at 886.

have felt the effects.”¹⁸⁸ In the 1995 edition, Rhode and Luban are not so sure. “What accounts for the recent increase is subject to dispute. Some commentators believe that incompetent practice is growing. As a profession becomes more competitive, as profit margins decrease, and as billable hour expectations escalate, lawyers are under more pressure to handle matters beyond their expertise.”¹⁸⁹

The overall impression given to a reader of the 1995 edition of *Legal Ethics* is still that legal malpractice is not a problem. Yes, there are now some disputes about legal malpractice data, but “despite the escalation of malpractice claims, the barriers to successful actions have remained considerable.”¹⁹⁰

Far from condemning Rhode and Luban for updating *Legal Ethics* with an alternative and more accurate point of view on legal malpractice, they should be commended. *Legal Ethics* is the only one of dozens of course books for the ABA-required course in ethics, professional responsibility, or the legal profession that even questions the ABA’s and the insurance industry’s “spin” on legal malpractice. However, much, much more needs to be rewritten and taught regarding legal malpractice.

¹⁸⁸ RHODE & LUBAN, *supra* note 176, at 956 (footnote omitted).

¹⁸⁹ RHODE & LUBAN, *supra* note 41, at 886 (citing Ramos, *supra* note 9).

¹⁹⁰ The quote continues:

[M]any individuals with grievances against a lawyer are unwilling to incur the cost and time, money, and acrimony involved in filing charges. Unless liability looks clear, damages are substantial, and the defendant has sufficient assets to make a judgment collectible, attorneys who specialize in malpractice litigation will generally decline the case. The burden of proof necessary to establish attorney liability is often difficult to meet. . . . Most successful claims involve fairly obvious errors, such as missing deadlines, neglecting to file documents, or failing to consult clients and follow their instructions.

In cases presenting less objective proof of error, clients will often have difficulty establishing what exactly the attorney did or did not do, and how that conduct fell below average performance standards within the relevant community.

Id. at 887 (citing Ramos, *supra* note 9 and the ABA STUDY, *supra* note 50). *But see* CAL. STATE INS. DATA, *supra* note 26; Perez-Peña, *supra* note 24, at A23 (quoting N.J. plaintiff’s legal malpractice attorney Hilton L. Stein). “I frankly think there’s an epidemic of legal malpractice in this country.” *Id.*; *see also* Ramos, *supra* note 19, at 2586–87, 2614–15 (noting that if it were not for the confidential settlement agreements and the extremely high percentage of uninsured lawyers who are not worth pursuing, the more than \$4 billion paid in legal malpractice by insurance carriers would be even higher).

B. Lawyers

Unexpectedly, the *Vanderbilt* article also caught the attention of publications aimed at lawyers. The *National Law Journal* said it was "worth reading."¹⁹¹ The *Pennsylvania Bar News*, received by every lawyer in Pennsylvania, profiled it in a front page story with the title: *Law Professor: Legal Malpractice Claims More Prevalent Than Studies Indicate*.¹⁹² The author, Jeffrey B. Albert, the Chair of the Pennsylvania Bar Association's Professional Liability Committee, was recently profiled in the *National Law Journal* as one of the best legal malpractice attorneys in the country.¹⁹³ After citing my experience in defending legal malpractice claims in California and my analysis of available data, Albert summarizes:

He [Ramos] concludes that legal malpractice claims . . . [are] about 5 to 10 times more than projected by the ABA study. In addition, he finds the severity of claims among larger firms to be substantially higher than projected by the ABA.

. . . .

[T]he questions he raises are serious and demand our attention. If he is correct, a lawyer can anticipate facing the prospect of four or five claims on the average during a professional career rather than the one or two predicted in the ABA studies

Unfortunately it is possible that even before more analysis is undertaken Professor Ramos' numbers will be accepted by underwriters for lawyers' professional liability insurance, with a consequent sharp increase in our premiums and tightening of available coverage. His conclusions may also encourage increased regulation of our profession, at a time when we are already subject of scorn by many serving in Congress.

Professor Ramos believes . . . that an even greater cause of the malpractice problem is "situational." As he describes it, "situational malpractice" arises from conscious decisions based on among other things work over-load, an understandable desire to satisfy short term client demands and a pressing need to attract and keep legal business, sometimes without regard to conflicts of interest.

¹⁹¹ Gerome Leone, *Worth Reading*, NAT'L L.J., July 24, 1995, at B10 .

¹⁹² Jeffrey B. Albert, *Law Professor: Legal-Malpractice Claims More Prevalent than Studies Indicate*, PA. BAR NEWS, May 29, 1995, at 1.

¹⁹³ See *Who's Who*, *supra* note 3, at A24 ("Jeffrey B. Albert heads the professional liability practice at Fox, Rothschild, O'Brien & Frankel, which has one of Philadelphia's largest practices defending lawyers. He also chairs the Professional Liability committee of the Pennsylvania Bar Association.").

While we are all aware of our goals in maintaining professional standards and enhancing quality, the true client-oriented, malpractice-free world will not likely come merely from exhortation. As Professor Ramos notes, most of the largest malpractice claims during the last ten years have been prosecuted against some of those considered to be among the very best lawyers in the country.

The best attack on the incidents and severity of legal malpractice may be more structural in nature. Institutionally, the courts and the bar may need to provide curative measures to keep mistakes from causing clients harm and by requiring computerization of deadlines to avoid missing due dates and other changes designed to lessen the opportunity for malpractice claims in the first instance.

We should not berate Professor Ramos for bringing this issue to the fore. Rather, he should be commended for his efforts to make us focus better on a reality of our professional lives that must merit more than a shrug that "it's someone else's problem."¹⁹⁴

Albert is more gracious and forgiving than most lawyers who equate getting the word out on legal malpractice to more lawyer bashing, higher insurance premiums for less coverage, and more regulation, such as mandatory insurance by legislators eager to appeal to the public's anti-lawyer sentiments.

C. Insurers

The reaction to the *Vanderbilt* article from the insurance industry was more predictable. The Oregon State Bar's Professional Liability Fund (PLF) is the only mandatory legal malpractice insurance program in the country. The Oregon PLF should be copied in other states.¹⁹⁵ The Oregon PLF should also be commended for supplying me with critical information for the *Vanderbilt* article.¹⁹⁶

However, now the Oregon PLF, like all the nation's legal malpractice insurance companies, including the two largest—Home Insurance Company (HOME), and Attorneys Liability Assurance Society, Ltd. (ALAS)—refuses to give me any information.¹⁹⁷ In response to a recent request for additional

¹⁹⁴ Albert, *supra* note 192, at 1, 3.

¹⁹⁵ See, e.g., Hall, *supra* note 78. Hall, the head of Oregon's PLF, has written an excellent article on why his program should be the model for other states. See also Ramos, *supra* note 19, at 2609-17.

¹⁹⁶ Ramos, *supra* note 9, at 1662 n.28, 1674-76, 1741 app.B.

¹⁹⁷ Telephone Interview with Robert E. O'Malley, Esq., Vice Chairperson and Prevention Counsel of ALAS (Jan. 3, 1994). ALAS, with \$220 million a year in premiums and 49,000 lawyer insureds, is the largest legal malpractice carrier based on premium dollars. O'Malley, citing "proprietary information," refused to give me any data. But see

Oregon legal malpractice data, Kirk R. Hall, the CEO of Oregon's PLF succinctly responded: "I was very much disappointed with your previous use of the materials I sent you concerning lawyer malpractice, and I strongly disagreed with many of your conclusions. For this reason, I am unwilling to provide any additional data or information for your future use."¹⁹⁸

For scholars, Oregon's PLF is a unique "goldmine" of legal malpractice data, untainted by high percentages of uninsured lawyers¹⁹⁹ or insurance companies who ignore mandatory reporting laws.²⁰⁰ Unfortunately, the Oregon PLF, like most insurance companies and lawyers, has its own agenda and it does not necessarily or often coincide with that of scholars or consumers.

D. Consumers

My efforts to write articles for newspapers, magazines, and the general public have so far been in vain.²⁰¹ Most publications, even those aimed at

Ramos, *supra* note 9, at 1749 app.D (summarizing ALAS's claim experience between 1979 and Nov. 30, 1990). *See also* Telephone Interview with Wendy Wangberg, Professional Liability Administrator, HOME (Feb. 22, 1993). HOME, with 60,000 lawyer insureds, writes insurance in 37 states and is the largest legal malpractice insurance carrier based on the number of lawyer insureds. Wangberg said that due to its "fear that competing insurance companies may gain an advantage in underwriting," HOME does not publish claims information. *But see* Ramos, *supra* note 9, at 1666 tbl.1, 1675-76 tbl.3 (detailing HOME's claim experience in key states).

¹⁹⁸ Letter from Kirk R. Hall, Chief Executive Officer of Oregon's Professional Liability Fund, to Professor Manny Ramos (Sept. 18, 1995).

¹⁹⁹ *See* OSTBERG, *supra* note 14, at 41; Calve, *supra* note 4, at 1; Moss, *supra* note 26, at 84; CAL. STATE INS. DATA, *supra* note 26; Bousquet, *supra* note 26.

²⁰⁰ *See, e.g.,* CAL. BUS. & PROF. CODE § 6086.8(b) (1990); FLA. STAT. ANN. § 627.912 (Supp. 1994); N.C. CENT. CODE § 26.1-01-06 (1989). *But see* Ramos, *supra* note 9, at 1666-68 (noting serious non-compliance with laws that mandate legal malpractice carriers to report all their claims to a department of insurance).

²⁰¹ In November 1995, ABC News in New York City sent a producer and three camerapersons to film my legal malpractice seminar at Tulane for a special one hour program by 20/20's correspondent John Stossel, *The Trouble With Lawyers*, that aired on January 2, 1996. *The Trouble With Lawyers* (ABC television broadcast, Jan. 2, 1996). However, my seminar, other film of legal malpractice lawyers in Florida and Texas, and even the words "legal malpractice" were never used. Instead, Stossel suggested a "loser pays" English system as the "remedy." The 20/20 producer for the special, Brian Ellis, said he would try to convince ABC News to air a 20/20 segment on only legal malpractice. *See also* Roberta Cooper Ramo, *A Special ABA Response*, 82 A.B.A. J. 9 (Feb. 1996). Ramo, the ABA President, in an "Open Letter to ABC" criticized the program as "simply a personal diatribe against the legal profession, an attack lacking any attempt to examine

lawyers, either ignore or continue to put a favorable "spin" on legal malpractice.²⁰²

However, a few weeks after refusing my unsolicited article proposal on legal malpractice, the *Wall Street Journal* featured the subject in a front page article.²⁰³ The full length article noted, in part:

When things go wrong these days, more and more clients see their lawyer as just another deep pocket. Frustrated by high fees, long delays and impersonal relations, they are suing over everything from soured real estate deals to disappointing trial outcomes, post trial judgments and appeals—and everyone from solo practitioners to corporate law firms.

....

So great is the demand for lawyers who sue other lawyers that the latest edition of "The Best Lawyers in America," a reference guide, is offering for the first time a state by state rundown of names.

....

The Attorneys Liability Assurance Society (ALAS), the largest U.S. insurer of big firms, has raised its premium at least 20% annually in four of the past five years.

....

"You wind up with simple cannibalization," says Joseph W. P. Acton, publisher of *Lawyers Liability Review*, a monthly newsletter on legal malpractice law. "Lawyers are eating lawyers to maintain their own standard of living."

....

Even suits that fail can take an emotional toll on lawyers, jack up their malpractice-insurance rates and force them to reassess the way they practice. "You can probably accuse a lawyer of bestiality and four or five other things and not bother him," says John R. Martzell, a legal-malpractice specialist in New Orleans. "But accuse him of misusing his license, and you really get him in the heart."²⁰⁴

serious legal issues on the role of lawyers with any depth or with any effort to ensure accuracy, fairness or objectivity." *Id.*

²⁰² See, e.g., *Legal Malpractice Actions Declined Sharply, But Older Cases Still Lingered*, NAT'L L.J., Dec. 25, 1995-Jan. 1, 1996, at C14. Summarizing 1995, this leading lawyer publication ignored that just about all monies paid on legal malpractice are confidential and stated: "[O]verall, the number and size of judgments against law firms decreased and, in comparison to the past several years, relatively few new lawsuits were filed." *Id.*

²⁰³ Milo Geyelin, *Their Own Petard: Many Lawyers Find Malpractice Lawsuits Aren't Fun After All; More Attorneys Are Sued By Clients Disgruntled About Advice They Got; Insurance Bills Are Rising*, WALL ST. J., July 11, 1995, at A1.

²⁰⁴ *Id.* at A1, A8.

Thus, as a scholar, and by writing and speaking²⁰⁵ to diverse audiences, I remain optimistic that my message and concerns about legal malpractice will eventually get out. As I will point out in my book, *The Worst Lawyers in America?*, to be published in 1997 by NYU Press, and which is geared to the general educated public, it is the court of public opinion that needs to be reached before any fundamental changes will occur to either the legal profession or legal education.

It was not until public opinion and consumers banded together and shared information regarding smoking, drunk driving, assault weapons, and nuclear accidents that public opinion overwhelmed the well-financed tobacco, liquor, gun, and nuclear industries. Change, particularly against such well-entrenched groups like lawyers, law schools, and insurance companies will not come easy.

VII. CONCLUSION: WHERE ARE THE REFORMERS?

For decades, the legal profession, law schools, and the insurance industry have successfully hidden the problem and prevented clients and non-clients from recovery for legal malpractice. Although, depending on the state and the type of practice, anywhere between ten and ninety percent of lawyers go "bare,"²⁰⁶ the ABA,²⁰⁷ organized state bar associations,²⁰⁸ and the insurance industry²⁰⁹ continue to oppose mandatory legal malpractice insurance.

Sadly, one of the main arguments for opposing mandatory legal malpractice insurance is that it will open the doors to more aggrieved clients filing even more malpractice claims.²¹⁰ However, an objective and informed look at Oregon's PLF, the nation's only mandatory legal malpractice program, should lead to the adoption of similar programs nationwide.²¹¹

Exposing the legal malpractice problem and how remiss the legal profession and legal education are in addressing it, will only go so far. As seen

²⁰⁵ For example, I spoke at the National Conference on Critical Legal Studies (Washington, D.C., Mar. 10, 1995), the Annual Conference of the Association of Legal Administrators (Orlando, Florida, May 23, 1995), and several CLE seminars in Tampa, Florida and New Orleans.

²⁰⁶ See CAL. STATE INS. DATA, *supra* note 19 (55%); OSTBERG, *supra* note 14, at 41 (40%); Calve, *supra* note 4, at 1 (between 50% and 90% of solo practitioners in Texas).

²⁰⁷ See Schneider, *supra* note 23, at 45.

²⁰⁸ See Lynch, *supra* note 28, at 46.

²⁰⁹ See Defoe, *supra* note 28, at 18 (noting that the Alliance of American Insurance was opposed to mandatory legal malpractice insurance). "Guaranteeing injured clients the means to collect gets beyond what the insurance product is designed to do." *Id.* See also Interview with Robert E. O'Malley, *supra* note 197 ("It simply does not work.").

²¹⁰ See Schneider, *supra* note 23, at 45.

²¹¹ See Hall, *supra* note 78; see also Ramos, *supra* note 19 at 2609-17.

with medical malpractice, countless studies and books have been published showing that rather than there being too many medical malpractice lawsuits, there should actually be more.²¹² Nonetheless, the American Medical Association, organized doctors, and the insurance industry continue to successfully lobby for medical malpractice "reform" laws that limit the availability and the compensation for aggrieved patients.²¹³

However, lawyers are not doctors. Lawyers fare much worse before juries,²¹⁴ who, after all, reflect the anti-lawyer public sentiment that is continually referred to in books,²¹⁵ movies,²¹⁶ television,²¹⁷ and even

²¹² See WEILER, *supra* note 8; see also Saks, *supra* note 8, at 709.

²¹³ Although both houses of Congress have passed far-reaching bills on tort reform capping punitive damages, non-economic damages, and "a loser pays" attorneys fees rule, individual states since 1986 have already made dramatic changes to basic tort law. For instance, only Arkansas, Maine, North Carolina, Pennsylvania, and Rhode Island have not done any of the following: modified or abolished joint and several liability (41 states); imposed various measures to restrict product liability lawsuits (35 states); prohibited punitive damages (4 states); capped punitive damages (12 states); changed the standard of proof for punitive damages to clear and convincing evidence (17 states); capped non-economic damages (17 states); and changed the collateral source rule so that damages would be reduced by other compensation (8 states). See Martha Middleton, *A Changing Landscape*, 81 A.B.A. J. 56, 58-59 (Aug. 1995).

²¹⁴ See Girardi & Keese, *Legal Malpractice Jury Outcomes* (1989) (on file with author) (showing that out of 106 legal malpractice jury verdicts rendered in Los Angeles County in 1988 and 1989 the lawyer-defendants lost ninety-three percent of the time); Linda L. Castle, *Review Claims Legal Malpractice Verdicts Average \$43,575*, 71 A.B.A. J. 122, 122 (Sept. 1985) (reporting that in 1984 lawyers lost sixty-seven percent of the time in legal malpractice cases tried before a jury); cf. CIVIL JUSTICE SURVEY, *supra* note 69, at 4 tbl.5 (noting that in the nation's seventy-five largest counties in 1992, there were 18,396 medical malpractice cases; 1,362 of those were disposed of by a jury case, and the defendant doctors won 69.7% of the time).

²¹⁵ See, e.g., BILL ADLER, *GREAT LAWYER STORIES: FROM COURTHOUSE TO JAILHOUSE, TALL TALES, JOKES AND ANECDOTES* (1992); PETER M. BROWN, *RASCALS: THE SELLING OF THE LEGAL PROFESSION* (1991); JOHN GRISHAM, *THE FIRM* (1991); ELLIE GROSSMAN, *LAWYERS FROM HELL JOKE BOOK* (1993); ROY GRUTMAN & BILL THOMAS, *LAWYERS AND THIEVES* 11 (1990) ("An attorney who treats his clients fairly and uses his skills to save their money instead of fill his own pockets is still rare enough to cause instant disbelief."); POETIC JUSTICE: THE FUNNIEST, MEANEST THINGS EVER SAID ABOUT LAWYERS (Jonathan Roth & Andrew Roth eds., 1988) (a compilation of derogatory statements compiled by the Nolo Press).

²¹⁶ In the 1960s, there were movies about principled and ideological lawyer protagonists such as *To Kill A Mockingbird* (Universal 1962) and *Inherit The Wind* (United Artists 1960), played by Gregory Peck and Spencer Tracy, respectively. However, today the negative image of lawyers leaves audiences cheering. See, e.g., *Cape Fear* (Universal

"objective" news shows.²¹⁸ The legal malpractice tide is fast approaching and lawyers, unlike doctors, have no place to seek refuge.

My confessions are not unique. The legal profession is failing its clients, the justice system, and the public. The legal educators are failing their students. It is naive to believe that any significant type of reform will come from within the legal profession or legal education.²¹⁹

Lawyers and law professors are, in the final analysis, still just people. In his recent book, David Margolick, a lawyer-turned-*New York Times*-columnist republished 120 of his weekly *At The Bar* columns.²²⁰ Margolick shows how lawyers are "nothing but mirrors of ourselves: honest and despicable, selfish and generous, free spirits and sticks-in-the-mud, unforgettable and unworthy and everything in between."²²¹

1991), *The Firm* (Paramount 1993), *Jurassic Park* (Universal 1993), *Presumed Innocent* (Warner 1990), *Regarding Henry* (Paramount 1991), *The Verdict* (Warner 1982).

²¹⁷ Note the difference between *Perry Mason* and the new breed of lawyer, Arnie Becker in *L.A. Law*. See David Margolick, *At the Bar; A Demand for a Cease-Fire on Lawyer-Bashing Puts a Bar President in the Line of Fire*, N.Y. TIMES, July 9, 1993, at B6 (describing two popular television commercials where in a Miller Lite Beer advertisement, a rodeo cowboy lassoes an overweight, white-middle-age male lawyer and a Reebok advertisement shown during the 1993 Super Bowl reminding viewers that on a "perfect planet there would be no lawyers").

²¹⁸ See Dan Rather, *See You In Court*, CBS 48 Hours (Dec. 1993). Respected CBS anchor, Dan Rather, began:

America is in love with lawsuits, but it may be a fatal attraction. We file nearly nineteen million suits a year. More than any other nation on earth. And there are more than enough unscrupulous attorneys ready to help you take your argument to court, whether it's justified or not.

Id.; see also Diane Sawyer, *Law and Disorder*, ABC Primetime Live (Feb. 1994). Respected anchor, Diane Sawyer began the report:

Just a generation ago they stood for what was best in us [film clip of Henry Fonda as Abe Lincoln] . . . [b]ut this is the lawyer of the 1990's [film clip from *Regarding Henry*], that symbol of self-interest and greed. What happened to change our opinion of lawyers over the years? Why do so many people think lawyers are mostly out for themselves?

Id.

²¹⁹ See Ramos, *supra* note 19.

²²⁰ DAVID MARGOLICK, *AT THE BAR: THE PASSIONS AND PECCADILLOES OF AMERICAN LAWYERS* (1995).

²²¹ *Id.* at 249.

It should not come as a shock to anyone that substantial numbers of lawyers and law professors place their own or their colleagues' interests before clients or students. Why should anyone be surprised when lawyers and law professors are unable to police themselves?

We can continue to lament all we want about *The Betrayed Profession*, the title of well-known lawyer Sol Linowitz's book.²²² However, Linowitz's attempt to search for the "tough minded people who are strong enough to bear the unpleasantness of enforcing ethical standards for the good of the community as a whole" is simply a futile exercise.²²³

Similarly, the ABA, now representing less than one-third of lawyers,²²⁴ is out of touch as shown by the following statements: "Lawyers should never forget that they are members of a profession, not a business. Lawyers' primary responsibility is to serve the client, the justice system and the public."²²⁵

The reality is that the legal profession and legal education are businesses. We can talk and teach all about the aspirational ethical standards, but, as noted by a recent cover story by the *U. S. News & World Report*: "[T]he real problem underlying the legal system's excesses [is] that lawyers increasingly are acting in the interests of no one but themselves."²²⁶ The same can be said about law professors.

In its January 1995 poll, *U.S. News & World Report*, consistent with earlier polls, found that fifty-six percent of Americans believe lawyers "use the

²²² SOL LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1995).

²²³ *Id.* at 112.

²²⁴ See Darryl Van Duch, *Bar Associations Face Declining Member Rolls*, NAT'L L.J., Jan. 15, 1996, at A1.

[M]embership in the ABA has declined from a high of 362,104 in 1991-92 to 339,476 in 94-95 "The ABA is losing members because it continues to be perceived as a national 'old boys' club run by the big law firms that cannot possibly understand the average lawyer," notes one disgruntled former member. . . . A related gripe, heard especially from minority attorneys, is that the ABA's executive ranks are dominated by white males.

Id. The 339,476 statistic includes first-year lawyers who do not pay dues and "members" like me who have no choice: all law schools join the entire faculty as ABA members at special rates. Since the ABA accredits law schools, it seems politically, like a logical decision by ABA law schools.

²²⁵ MCKAY REPORT, *supra* note 15, at 9.

²²⁶ Stephen Budiansky, et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50.

system . . . to enrich themselves.”²²⁷ Similarly, university administrators are in awe at how their law schools are “cash cows” and unabashedly use the high law school tuition income to support other academic departments.

Teaching ethics to law students or lawyers is not going to salvage the ideals of the venerated legal profession, if those ideals ever indeed existed, nor change errant attorney behavior.²²⁸ As California has recently shown, spending \$40 million each year for sophisticated state bar disciplinary proceedings and a State Bar Court does not work either.²²⁹

Reform is slowly arriving in the form of better informed and sophisticated clients who refuse to again pay either for the exorbitant legal fees of the 1980s²³⁰ or for their lawyers’ mistakes. Since 1990, more than two dozen large

²²⁷ *Id.*; see also Gary A. Hengstler R. William Ide, III, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60, 64 (Sept. 1993). The article concludes that lawyers are not compassionate or caring, nor easily understood, nor honest and ethical, and do not put clients first or are not dedicated to their rights. However, lawyers are perceived as smart, knowledgeable, competent people who do solve problems, but still make too much money and are greedy. *Id.*; see also Randall Samborn, *Anti-Lawyer Attitude Up*, NAT’L L.J., Aug. 9, 1993, at 1 (“[T]he widely held perception that resentment of lawyers—ranging from lawyer-bashing jokes to outright vilification—is running at a fever pitch. And it is especially high among better-educated, higher-wage earners in society.”). These public attitude polls mirror lawyer bashing. For instance, there are no “dumb lawyer” jokes: another benefit of confidential settlement agreements.

²²⁸ See Gordon, *supra* note 73, at 2109; Geoffrey C. Hazard, Jr., *Law Schools Must Teach Legal Ethics*, 4 NAT’L L.J., Oct. 7, 1991, at 17.

Put bluntly, there is good evidence that many beginning lawyers are taught by example to be indifferent to elementary ethical obligations and are tacitly invited to violate them. Hence, law school training must not only overcome ignorance but must anticipate that many students soon will be plunged into work settings that are ethically negligent or malignant. Programs of continuing legal education in professional ethics should proceed on the same premise.

Id.; Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students’ Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 575 (1991) (“[M]any students saw a lawyer lie, cheat, or disservice a client, frequently doing so as if this were ‘business as usual’ in the legal profession.”); Rhode, *supra* note 33, at 40.

²²⁹ See Gallagher, *supra* note 15, at 628.

²³⁰ See John W. Toothman, *Real Reform*, 81 A.B.A. J. 80, 82 (Sept. 1995) (“Having learned from the 1990 recession, clients will never again return to paying exorbitant fees. They instead seek pragmatic, streamlined law firms.”).

law firms have disappeared because of their inability to keep up with the rapidly changing client environment.²³¹

Clients and, for that matter, non-clients are part of the consumer movement that will continue, whether it is acknowledged or not, to "self-regulate" lawyers through legal malpractice. Teaching and informing law students and the consumer public about the realities of legal malpractice and forcing lawyers to get insurance and, yes, the lawsuits against lawyers will, in the short term, increase. Ironically, however, the \$4 billion price tag will eventually decrease if proactive claims handling, the type used by Oregon's PLF, is implemented nationwide.²³² Law students, law professors, lawyers and also potential victims will pay more attention. Legal malpractice is easy to understand: if the lawyer makes a mistake and causes damage, the lawyer, not the client, pays.

Judges, lawyers, law professors, and law students are curious about legal malpractice. We secretly enjoy stories about the mistakes of others. What should not be lost and gives us all some optimism, is that all law students and lawyers would genuinely like to learn how to avoid malpractice. Aggrieved clients, non-clients, or the public could care less if the motivation emanates from selfish motives, that is, to avoid the emotional, financial, and reputational pain associated with legal malpractice. They just want the lawyers, to the extent

²³¹ See *id.*; see also THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994). Professors Shaffer and Cochran note:

The earliest ethical tradition among American lawyers depended on a sensitive and learned moral stance in the lawyer. The grandfather of American legal ethics, David Hoffman of Baltimore, in his "Resolutions on Professional Deportment" (1836), described the beginning law student as "a young man of the soundest morals, and of the most urbane, and honorable deportment." All it was necessary for legal education to add were "a few rules for his future government." . . . For Hoffman, there was a place in the practice of law for the lawyer's morality, but little place for the client's morality.

Id.

²³² See Ramos, *supra* note 19, at 2614-15 (using the Oregon PLF's experience and efficient claims handling as a model and extrapolating to the entire nation to show how the \$4 billion annual costs could actually decrease).

that it is possible,²³³ to avoid legal malpractice.

Law professors have been talking about and trying to teach ethics in law schools since 1836.²³⁴ Mandatory legal ethics courses²³⁵ and the pervasive method²³⁶ have been around in law schools since 1917. But once law students

²³³ See, e.g., ABA DATA, *supra* note 50, at 581; Ramos, *supra* note 9, at 1671 n.89.

TABLE 7. LEGAL MALPRACTICE: TYPES OF MISTAKES

Mistake	ABA Study	Ramos Cal. Study
Substantive errors	43.9%	45.2%
Administrative	25.9%	26.2%
Client Relations	16.4%	16.7%
Intentional	11.7%	11.9%
All Other	2.7%	0%

Id. Thus, arguably half of legal malpractice is probably unavoidable.

²³⁴ See David Hoffman, *Resolutions in Regard to Professional Deportment, In a Course of Legal Study* (2d ed. 1836), reprinted in THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* 59-164 (1985).

²³⁵ Northwestern law professor George P. Costigan describes how ethics became a mandatory course at Northwestern. He also described in 1918 many of the same problems faced by law professors who teach ethics today: [Students'] "alacrity probably was due to their ingrained belief that they could solve, intuitively, any ethical problem . . . The examination books probably disclose a very considerable ignorance on the part of students in regard to the very ethical matters treated in the lectures." He also found "the feeling of the students [was] that the faculty itself stigmatized the subject as relatively unimportant." See George P. Costigan, Jr., *The Teaching of Legal Ethics*, *AMER. LAW SCHOOL REV.* 290, 291-92 (1918); see also GEORGE P. COSTIGAN, JR., *CASES AND OTHER AUTHORITIES ON LEGAL ETHICS* (1917).

²³⁶ See Costigan, *supra* note 235, at 296.

[T]he best way to teach legal ethics is to teach it so that the great body of students will get from it an improved ethical outlook and enthusiasm for the profession of the law as a profession, and not as a business. A fundamental condition of that best way of teaching it is to furnish a student with a proper quantity of source materials early in his law school career, to discuss the important things with him then, and to get the whole faculty, from then on, to cooperate in aiding his moral professional growth.

Id.; see also David T. Link, *The Pervasive Method of Teaching Ethics*, 39 *J. LEGAL EDUC.* 485, 485 (1989). According to the author at Notre Dame Law School, "[E]very professor in every course [is expected] to discuss ethics along with substantive, theoretical, and procedural law." *Id.*

enter the practice of law, ethics and ethics instruction are treated as a joke, becoming something for the ivory tower law professor.²³⁷ Legal malpractice, however, is the reality faced by practicing lawyers, the source of the secret \$4 billion a year economy.

It is now time to teach legal malpractice as its own course, as a major part of a mandatory ethics course, or preferably, in each of the other courses in the law school curriculum, in mandatory continuing legal education courses, and in law firms' in-house training programs. Perhaps, the course could even begin by telling students about a young malpractice defense lawyer in Southern California whose law firm in the 1980's went from seven to over two hundred lawyers by representing lawyers who got sued for legal malpractice.

I will continue to teach, research, write, consult, and talk about legal malpractice. Unfortunately, for lawyers, law professors, and consumers, the teaching and learning of legal malpractice is not a panacea. Legal malpractice will only continue to get worse. In the meantime, when are lawyers and law professors going to confess to their mistakes? Can we afford to wait?

²³⁷ See Hellman, *supra* note 228, at 575; see also Edwards, *Disjunction supra* note 43, at 73.

Unfortunately, as my survey shows, a "strong foundation in ethics" is not being built in legal education. Our law schools must place much more emphasis on serving underrepresented persons. The professional responsibility class must not be a "joke." More generally, ethics can and should be taught pervasively, in almost every law school course. [Quoting one former law clerk]: "The one course that was irrelevant and disdainful was professional responsibility. As taught, it was a joke. Although we read and became quite familiar with the code and model rules, there were no materials on case law relating to ethics. We gained no familiarity with the different procedures for enforcing the rules. And there was no sense that we might actually be presented with difficult problems that would require action."

Id.; Rhode, *supra* note 33, at 40 n.46.

